MISSISSIPPI LAW JOURNAL

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Robert J. Farley

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MISSISSIPPI STATE BAR

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Mississippi Law Journal

VOLUME XXIV MAY, 1953 NUMBER 3

ADMISSION TO THE BAR—A COMPARISON

*Robert J. Farley**

Of peculiar interest to the Bar of Mississippi should be the publication last year of the *Report on Bar Examinations and Requirements for Admission to the Bar*[1] as a part of the Survey of the Legal Profession. The initial portion is a composite of the reports of the twelve members of a committee[2] with observations and comments by the Consultant, who considered that the reports of the Committeemen were of such intrinsic importance that they should be preserved and hence were included in their entirety to make up the remainder of the book. The reports are based generally on data available as of January 1, 1949, though some occasional subsequent information was used.

This material was secured from law school deans, law school teachers, bar examiners, lawyers and others. Surprising is the variance in selection, qualifications, and terms of bar examiners in the forty-eight states, types of questions, subject-matter, grading and results. Startling in the difference in the requirements of pre-legal and legal education for admission to the Bar. And yet there should be no wonderment at the incongruity, inconsistency or lack of uniformity in the forty-seven other states by the bar of a state that maintains the adsurdity, on the one hand, of a fully accredited law school with the diploma privilege and, on the other hand, authorizes bar examinations that may admit to practice applicants who have no required legal education and scarcely any scholarship.[3] Of peculiar interest indeed—this book should be of peculiar perturbation!

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*Dean and Professor of Law, University of Mississippi.

[1]Published by Shepard's Citations, copyright by Reginald Heber Smith 1952, VIII—498 pp.

[2]Advisory and Editorial Committee on Bar Examinations and Requirements for Admission to the Bar.

[3]It is hoped that no one will construe anything that appears in this editorial as a personal criticism or a reflection on any member of the Board of Bar Examiners of Mississippi, past or present. They are victims of a system provided by our legislature. All with whom I have talked agree that the system is bad. It could hardly be expected that three busy practitioners could serve without pay, prepare questions, give examinations, and grade papers with any degree of proficiency in a large variety of subjects with which they have had no general acquaintance since they themselves were students. Quite apparently the experince in other states with such a system is no different, regardless of the intention, sincerity, or learning of the personnel.

Most reforms are accomplished circuitously and the history of the efforts of the American Bar Association is no exception. In 1892 the Association

> "resolved that two years of law study should be required of every student before he presented himself for the bar examination and in the older states it was suggested that the limit be extended to three years. It also declared against the diploma privilege."

Its excellent work has been directed along these two principal lines ever since. Indirect pressure from setting up the Section of Legal Education as an accrediting agency has given continuity to its program. Its educational standards are now three years of law preceded by a minimum of three years of college. On the diploma front the privilege of admission without examination is available only in Alabama, Florida, Mississippi, Montana, South Dakota, West Virginia and Wisconsin.[4]

The arguments against the diploma privilege then and now are that (1) if one school has it, it will be extended by political pressure to all schools, and (2) without the inspiration of bar examiners standards will sag and teachers will "sink into that condition of uninspired placidity which is only too characteristic of many American college professors."

The first argument may have had some merit in 1892 in some states. It has certainly no cogency past or present in Mississippi, nor is it likely to have. And the second argument may have been appropriate when a law faculty was a haven to which practicing lawyers retired but in this day of professional teachers the bar examiners are the bane of standards and are recognized as such by the American Bar Association itself as well as the Association of American Law Schools, which very properly inveigh against bar cram courses and fitting of curricula to bar examinations. Nothing "practical" has come from bar examinations. It is believed that a cursory investigation will show very much the same pattern as a result of the efforts since 1892 of the American Bar Association.

Legal education made great strides in both quantity and quality in the accredited schools. Bar examiners continued to be selected for every conceivable reason except qualification to give bar examinations. Unqualified candidates for admission too frequently passed. Best qualified products of best law schools too frequently failed. The inevitable happened in most instances. In response to pressure of the law schools and their alumni, bar examiners began giving law school type examinations. California and Connecticut now give questions provided (with the documented answers) by law teachers—the ideal situation or the practical

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[4] *Op. cit. supra* at 277.

equivalent of the diploma privilege once removed. Louisiana examiners have an advisory committee made up of representatives of the three accredited law schools of the state. Assistants are provided in a number of states for preparing and grading questions. In states that do not give law school type examinations and grade them accordingly, criticism is harsh.

> "Anyone who has made even a hurried survey of bar examining processes as they have been administered for many years, and as they are now administered, in most of the forty-nine admitting juisdictions of the continental United States, will probably agree that they are woefully inadequate,"

gently says the report of Herbert W. Clark. He then recommends and makes out a case for a national board of bar examiners. For proof of the desirability and effectiveness of such a board the National Board of Medical Examiners is offered.

All this is well and good. However, if there is one thing shown in this unhurried survey of the legal profession it is that thus far no standards have been raised by bar examiners or bar examinations. Instead the real improvement in the legal profession, just as it was in the medical profession, has come from requirements of increased pre-professional and professional education before a candidate for admission could take the admission examination. For many years there has been no admission problem with physicians. The problem is getting into and graduating from an accredited school—and there is no other kind! If it isn't accredited it is not a medical school. If every candidate for admission had graduated from a reputable law school the whole problem would fade. It appears that since 1892 most states have increased the educational requirements for applicants for admission. Tremendous changes have taken place since 1927—everywhere except in Mississippi. Mississippi now stands alone as the only state that requires no legal education and scarcely any pre-legal education.

The argument in Mississippi, just as in other states, over improving bar standards, has centered around the potential Lincoln—although to date none has been uncovered. It is further agreed even by friends of learning that in this day of complicated practice few unqualified persons take the bar examinations with a view to active practice and of those who pass and attempt it scarcely any last a year. It is believed that an investigation will show ulterior motives by the unqualified: (1) advancement in civil service, (2) tax law practice by accountants, (3) positions with banks, trusts, insurance and title companies which do not want to run afoul of unauthorized practice of the law penalties and make no distinction between training and license. No sorrow is felt for the government,

the public or even the poor qualified boy who has worked his way through college or gone in debt for his training and who is defrauded of opportunity to a degree.

Instead of contributing to standards in Mississippi, the bar examination process has probably deteriorated historically. By Act of February 12, 1819, an examintion before the Supreme Court by a committee was required. Additional conditions were added in 1822. By Act of February 14, 1828, it was provided that

> "hereafter no person shall be licensed to practice law within this state, until he shall produce satisfactory evidence that he has regularly studied his profession for the term of two years, in the office or under the direction of some respectable lawyer or judge. . . ."

Thenceforward by successive legislative enactments until 1916 all applicants for the bar were examined by the judiciary under varying plans involving the circuit, chancery and supreme court judges. But in 1916[5] an act was passed establishing a "State Board of Bar Examiners," consisting of three members of the state bar, appointed by the governor for a term of two years, and requiring of applicants at least a high school education or its equivalent. In 1932 substantially the same statutes were reenacted except the name was changed to the "Board of Bar Admission." This is the prevailing law. There would seem to be no legal obstacle to prevent the Supreme Court, or the circuit and chancery courts, from raising the bar standards since they are constitutional courts in which the "judicial power" of the state is vested,[6] enrollment by attorneys is traditionally required, and the majority rule[7] is that while the legislative branch under the police power may prescribe rules for admission, such do not deprive the courts of their inherent power to prescribe additional conditions of admission to practice before them. This, however, would not reach those who are being admitted for civil service preferment and to avoid the above-mentioned unauthorized practice penalties.

Such an attitude on the part of the courts, however, would help in pointing out our scandalous lack of elementary requirements.

The only safeguard as proved by the experience of other states as to the legal as well as other professions is to have a more stringent requirement of training before eligibility to become a candidate for admission. Perhaps it is impossible to get our legislature to pass an act changing the

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[5]Laws of 1916, c. 107; MISS. CODE § 8647 (1942) *et seq.*
[6]MISS. CONST. ART. V § 140.
[7]66 A.L.R. 1512.

high school education, or its equivalent, to a degree from an accredited law school, which would necessitate presently three years of college as well, but it is believed if in the alternative one must have had four years of study in a law office with registration of intention at the time of beginning study, a tremendous step forward would be taken which might also satisfy those fearful of blighting the budding Lincolns.

> "The law is a public profession and, therefore, legal education must be considered from the public rather than the private viewpoint. . . . If it is said that higher standards . . . would bar some poor boys from becoming lawyers, is not the logical answer that standards for law schools and for admission to the bar must be determined on the basis of what is in the public interest and not on the rights of any individual to become a member of any given profession or calling without being adequately prepared to fulfill its obligations? . . . A standard set to meet every condition of poverty is no standard at all. No one, rich or poor, should consider himself entitled to admission to any profession without meeting fair professional standards. It is impossible to place a hurdle low enough to accommodate every underprivileged person, and yet place a bar to the unworthy ones who look upon the law as the easy way to a position where one may live by his wits and prey upon the public."[8]

[8]The Law School of Tennessee, Report of the Survey Committee (1938) pp. 6, 7, 21, quoted *op. cit.* note 2, pp. 300-301.

CONSTITUTIONAL AMENDMENT BY TREATY AND EXECUTIVE AGREEMENT

*John C. Satterfield, Sr.**

Ever since the people of the United States safeguarded their individual rights to life, liberty and property and to their collective right of local self-government by the adoption of the Constitution of the United States and its Bill of Rights, we have thought that any material change affecting such rights could be brought about only by the orderly process of amendment set up in the constitution as the means for the expression of the desire of the people themselves for such change. Our Constitution was raised as a bulwark to protect the rights of the people and the rights of the states as against encroachments by the officials of a national government, recognizing the principle stated by George Washington that, "Government is not reason, it is not eloquence—it is force! Like fire, it is a dangerous servant and a fearful master."

It now appears possible, even probable, that the Constitution of the United States may be amended so as to modify or destroy the Bill of Rights or to completely upset the distribution of governmental powers between the states and the federal government by a treaty approved by the President and two-thirds of the members of the United States Senate then voting, or even by an executive agreement approved only by the President of the United States. Neither the people of the United States, through constitutional conventions or their state legislative bodies, nor the House of Representatives of the United States would be consulted or called upon to approve or disapprove such amendments.

How is it possible for such a radical departure from the basic concept of our constitutional form of government to be brought about? George Washington said, "If in the opinion of the people, the distribution . . . of the constitutional powers be in any particular wrong, let it be corrected by an amendment, in the way which the constitution designates. But let there be no usurpation." Those who framed our Constitution at Philadelphia believed the people had reserved to themselves the power of amendment.

The people of the United States have not set up a government based upon a blind trust that the individual who may be President, of the individuals who may constitute a majority of any single legislative body will protect the basic rights of individual freedom and of local self-government, but, as the Supreme Court itself has said through Chief Justice Fuller:

"While the people are thus the source of political power, their

*Satterfield, Ewing, Williams and Shell, Jackson, Mississippi.

governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities."[1]

The necessity of such limitations has been clearly enunciated by the Supreme Court:

"Constitutional questions, it is true, are not settled by even a concensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."[2]

But changing concepts of the functions by means of which the powers of sovereignty are exercised and of the meaning of the words used in the Constitution threaten to open a dangerous gap in the bulwark originally erected to safeguard the individual liberties of the people and their right of local self-government from a too powerful central government.

The Constitution provides by Article II, Section 2, for the making of treaties in enumerating the powers of the President:

"He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."

The effect of such treaties is set forth in the "supremacy clause" in Article VI:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The modern concept of the effect of treaties was summarized by John Foster Dulles, now Secretary of State, in an addres before the Regional Meeting of the American Bar Association at Louisville, Kentucky, on April 12, 1952, as follows:

'The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also they make do-

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[1] *In Re* Duncan, 139 U.S. 449 (1891).
[2] Muller v. Oregon, 208 U.S. 412 (1908).

> mestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas treaty law can override the constitution. Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the states and give them to the Federal Government or to some international body and they can cut right across the rights given the people by the constitutional Bill of Rights."[3]

When our constitution was framed, the field of treaties was thought to be restricted and it appeared that the distinction between external affairs and internal affairs would be sufficient to prevent the use of treaties to obtain the effect now claimed under the supremacy clause. This concept is set forth in Jefferson's *Manual of Parliamentary Practices* as follows:

> "By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaties, and cannot be otherwise regulated.
>
> "It must have meant to except out all those rights reserved to the states; for surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way."[4]

One of the treaties entered into under the authority of the United States within recent years is the United Nations Charter. It contains a provision that

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, or require the Members to submit such matters to settlement under the present Charter. . . ."[5]

Nevertheless, the modern concept of external and internal affairs and of domestic and international jurisdiction is illustrated by the statement of Moses Moskowitz in the *American Bar Journal:*

> "Perhaps, the correct position would be that once a matter has become, in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly or by convention between member states at the instance of the United Nations, that subject ceases to be a matter being 'essentially within the domestic jurisdiction of the Member States'."[6]

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[3]Dulles, *The Negotiation of Treaties.* See 38 A.B.A.J. 487 (1952).
[4]38 A.B.A.J. 736.
[5]U.N. CHARTER, ART. II.
[6]Moskowitz, *Is the U.N.'s Bill of Human Rights Dangerous?,* 38 A.B.A.J. 283, 285 (1949).

In its formal report to President Truman, the President's Committee on Civil Rights headed by Charles E. Wilson as Chairman urged[7] the use of the "power derived from the treaty clause in Article II, Section 2 of the Constitution, to protect civil rights which acquire a treaty status," under Article 55 and 56 of the United Nations Charter, and future contemplated action of the United Nations. This committee urges that such power, as construed by the Supreme Court in *Missouri v. Holland*,[8] will render enforceable legislation which would otherwise be unconstitutional and void as contrary to the Bill of Rights and the reservation of powers to the states. The Committee states:

> "The Human Rights Commission of the United Nations is at present working on a detailed international bill of rights designed to give more specific meaning to the general principle announced in Article 55 of the Charter. If this document is accepted by the United States as a member state, an even stronger basis for congressional action under the treaty power may be established."[9]

The possibilities inherent in this trend are emphasized by the dissenting opinion of Chief Justice Vinson in the *Steel Seizure Cases*,[10] in which two other justices joined. This opinion held that the United Nations Charter and the North Atlantic Treaty give the President the power to seize private property, although no statutory authority has been granted by the Congress and although under the Constitution as construed by the majority of the Court the President has no such power and although by the Fifth Amendment he is denied the right to take property without due process of law and without just compensation. As stated by the Committee on Peace and Law Through United Nations of the American Bar Association in its report of September 1, 1952,

> "If two additional judges had accepted the views of the Chief Justice, the treaty known as the United Nations Charter and the North Atlantic Treaty, made by the President and consented to by the Senate, would have effected a fundamental change in the American form of government, without Congress, or without the states or the people (to whom all powers not delegated are reserved under the Tenth Amendment) having anything to say about the matter."

But, strange to say, the advocates of amendment by change in concept of the nature of certain functions of sovereignty and by change in the meaning of terms, are not content to espouse the amendment of the

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[7] p. 110 *et seq.*
[8] 252 U.S. 416 (1920).
[9] p. 111.
[10] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Constitution by treaty made by the President with the advice and consent of two-thirds of the Senators present and voting. They go even further and advocate the use for that purpose of executive agreements, entered into by the President without the advice and approval of anyone (except, perhaps, the State Department). Although no reference is made in the Constitution to executive agreements, nevertheless they have been used as a method of agreement by the United States with foreign government from the inception of our government. Such agreements were held to be enforceable within the United States, and to supersede state laws, in *United States v. Pink*.[11] Executive agreements were originally employed to set forth understandings with foreign governments as to routine and relatively unimportant matters, not considered of sufficient import to warrant the use of a treaty.

In line with the general usurpation of power by the executive branch of the government, executive agreements have increased rapidly in number and in the scope of matters covered, until there is now no recognized dividing line between the proper use of treaties and of such agreements. Further usurpation by the executive has been advocated by Wallace McClure, who was from 1920 to 1951 an officer of the State Department and at onetime Assistant Chief of the Treaty Division:

> "For controversial international acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements. But for large numbers of purely routine acts, about which no public opinion exists and no question as to their acceptability arises, the present method is desirable."[12]

Which, being translated, is to say that international agreements (which may "cut right across the rights given the people by the constitutional Bill of Rights . . . [and] take powers from the states and give them to the federal government or to some international body") should be executed by the President alone, without the advice and consent of the Senate whenever it appears that such agreements would be contrary to the wishes of the people of the United States. Coupled with the above report of the President's Committee on Civil Rights and the position of three members of the Supreme Court in the *Steel Seizure Cases*,[13] we have highly placed and substantial authorities who publicly advocate and officially approve fundamental changes in the constitutional rights of individuals and of the states without an amendment of our Constitution.

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[11]315 U.S. 203 (1942).
[12]McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 378 (1941).
[13]See note 10 *supra*.

IS THERE A REAL AND PRESENT DANGER THAT CONSTITUTIONAL AMENDMENT BY TREATY OR EXECUTIVE AGREEMENT MAY BE PERMITTED?

In approaching a question of constitutional construction, it is not enough to evaluate former decisions of the Supreme Court and then rest upon a probable decision foreshadowed by the application of the principle of stare decisis.

Our Supreme Court has gone far enough to say that legislation must be construed "in the context of the history of federal absorption of governmental authority over industrial enterprise" and even to assert concerning the legislation under review that the act is one of those which "radically readjusts the balance of state and national authority."[14] It then said, "To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual states." Our plight is well stated by Mr. Justice Black in his dissent in the case of *Adamson v. California*,[15] in which he says:

> "This decision reasserts a constitutional theory spelled out in Twining v. New Jersey, that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice'."

In the light of this judicial trend, is it reasonably necessary to obtain an amendment of the Constitution to forestall a possible radical invasion of the individual rights of citizens and of the powers of the states by treaty or executive agreements? The shifts in the construction by the Supreme Court of the Supremacy Clause clearly indicate that such an amendment is necessary. The early Supreme Court was Federalist in personnel. The Court held in 1796 that the treaty making power was of at least equal force with the Constitution itself. In *Ware v. Hylton*[16] the court nullified a Virginia statute confiscating certain British claims as violating the Treaty of Paris, and Mr. Justice Cushing said:

> "The treaty, then, as to the point in question, is of equal force with the Constitution itself; and certainly, with any law whatsoever."

Later there was a shift in the attitude of the Court, for in 1853 in *Doe v. Braden*[17] it was held:

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[14]Kirschbaum Co. v. Walling, 316 U.S. 517 (1942).
[15]332 U.S. 46 (1947).
[16]3 Dall. 199 (U.S. 1796).
[17]16 How. 635 (U.S. 1853).

> "The treaty is therefore a law made by the proper authority, the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States."

This trend continued for many years, for in 1890 it was held in the case of *Geofroy v. Riggs*[18] that:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

In 1913 Congress enacted a Federal Migratory Bird Act. In 1914 the act was held unconstitutional on the ground it invaded the reserved powers of the states:

> "That the national Constitution is an enabling instrument and therefore Congress possesses only such powers as are expressly or by necessary implication granted by that instrument, is not questioned. Unless therefore, there is some provision in the national Constitution granting to Congress either expressly or by necessary implication the power to legislate on this subject, the act cannot be sustained."[19]

Some years later a treaty was made with Great Britain governing the protection of migratory bird life. Legislation thereunder, to the same effect as the Migratory Bird Act of 1913, was attacked on the same ground upon which *U. S. v. Shauver*[20] was decided, but the government contended it was a necessary implementation of a treaty. In *Missouri v. Holland*[21] the validity of the act was affirmed and Mr. Justice Holmes said:

> "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the conven-

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[18]133 U.S. 258 (1890).
[19]U.S. v. Shauver, 214 Fed. 154 (E.D. Ark. 1914).
[20]*Ibid.*
[21]See note 8 *supra.*

> tion. We do not mean to imply that there are no qualifications to treaty making powers; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with, but a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government is not to be found'."

The effect of a treaty as the supreme law of the land, overriding state statutes and constitutional provisions, has been applied in recent years in numerous cases.[22] The similar effect of executive agreements is recognized.[23]

We are not concerned here with what the writer of this article feels to be a proper construction of the above provision of Article VI of the Constitution or what any person or persons may conclude to be a proper construction thereof. We are deeply concerned with the fact that, in the light of the modern trend to disregard precedent and to give to the Constitution of the United States all the attributes of an accordian which may be periodically expanded and contracted by the Supreme Court to accord with "the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice'," there is a real and present danger that there may be adopted in the near future, and upheld as the supreme law of the land, treaties or executive agreements which can, in the words of Frank E. Holman, past president of the American Bar Association, before the Subcommittee of the Senate Committee on the Judiciary, on February 18, 1953:

> "(a) Change our form of government from a republic to a socialistic and completely centralized state;
>
> (b) . . . put us into a World Government without the people either directly or through the Congress passing on the question;
>
> (c) . . . increase the powers of the Federal Government at the expense of the states. For example, in the so-called field of civil rights, a treaty can do what the Congress has heretofore refused to do. The Congress has to date refused to enact the civil rights program. To get around this, in spite of Congress, the Truman Committee on Civil Rights last year proposed that the Human Rights Commission of the United Nations incorporate the President's program in treaty form and thus circumvent the Congress (Civil Rights Committee Report, paragraph 10).
>
> (d) A treaty can seriously affect our basic individual rights as, for example, the right of a citizen to be tried in American

[22]Valentine v. U.S., 299 U.S. 5 (1936); Santo Vincenzo v. Egan, 284 U. S. 30 (1931); Asakura v. Seattle, 256 U.S. 332 (1924).

[23]U.S. v. Pink, *supra* note 11; U.S. v. Belmont, 301 U.S. 324 (1937).

> courts and under the protection of "due process." This was openly asserted in the Report of the Section of International Comparative Law to the House of Delegates of the American Bar Association in February, 1952, where it was stated: 'So far as the requirement of indictment by grand jury and trial by jury are concerned, these apply only to trials in the federal courts, and can have no application to an international court set up by a group of nations in the exercise of their treaty-making power . . . there is no reason why such courts may not be created in the exercise of the treaty-making power'."

Constitutional Amendment Is Necessary To Protect Our Bill of Rights and To Prevent Encroachment of Federal Powers

For several years Mr. Holman and many other leading lawyers of the United States have been actively presenting the need of a protective constitutional amendment to legislators and other leaders throughout the United States. The House of Delegates of the American Bar Association, upon the recommendation of the Committee on Peace and Law Through United Nations, has approved for submission to the Congress a suggested amendment to the Constitution which reads as follows:

> "Section 1. A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.
>
> Section 2. Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this article."

There is now before the Senate of the United States Senate Resolution No. 1 of the 83rd Congress, introduced by Senator Senator John W. Bricker of Ohio, joined by 61 other senators, which proposes a constitutional amendment designed to regulate and restrict treaties and executive agreements which is generally to the same effect as the draft proposed by the American Bar Association. Ten similar resolutions have been introduced in the House of Representatives. Some of these resolutions are subject to objections not applicable to the draft suggested by the American Bar Association, but all are calculated to meet the dangers inherent in the modern conception of the use of treaties and executive agreements.

The effect of the above suggested amendment may best be presented by a discussion of the objections which have been raised by the internationalists, and which it appears will be urged by the State Department. Some of these objections are so ill-founded that they would be ludicrous, were

they not urged with such solemnity by many of the opponents of a protective amendment. One of the most vociferous opponents is Professor Zechariah Chafee, Jr., a professor of law in Harvard University, and the following references are to an article by him appearing in the *Louisiana Law Review*.[24]

The chief objections to such amendment voiced by Professor Chafee and others may be summarized as follows:

1. The first sentence of Section 1 of the proposed amendment is unnecessary, as treaties are now subject to constitutional limitations and can not affect the Bill of Rights or the distribution of powers between the states and the federal government.

2. Such first sentence is undesirable as it will render the enforcement of a treaty doubtful and difficult until its constitutionality has been tested in the courts.

3. The second sentence of Section 1 would cripple the treaty-making power as it would prevent treaties from being self-executing and would necessitate action by Congress to render a treaty effective in internal matters, thereby making the United States "incapable of bargaining like a great nation, or even a little one."

4. If a treaty were signed which required action by Congress to make if effective as internal law, during the interim between the execution of every treaty and the enactment of the necessary federal statute, the treaty might be wholly disregarded and in the case of any treaty as to which Congress declined to pass supplementary legislation, "the nation to which we gave our solemn promises can hold us up to scorn as contract-breakers." We might be subject to "grave reprisals" for not acting "in good faith."

5. The second sentence of Section 1 is unnecessary as "the moment that Congress decides that a treaty is producing evil results, a majority of both Houses can pass an act ending the internal effect of this treaty," citing the *Head Money cases*,[25] the Chinese Exclusion case,[26] and other cases.

6. We should trust the then President and Senate to act for the best interests of the people and should not have constitutional limitations upon their powers.

7. There has been no change since the Constitutional Convention of 1787 which would warrant an amendment nor any treaty already entered

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[24] 12 La. L. Rev. 345 (1952).
[25] 112 U.S. 580 (1884).
[26] 130 U.S. 581 (1889).

into which is objectionable, hence the "home of the brave" should not be "terrified" by treaties but should wait to close the barn door after the horse has gone.

8. No limitation should be placed upon executive agreements.

In discussing the objections which have been advanced to the proposed amendment, it is not necessary to point out the inevitability of an invasion of individual liberties or of the rights reserved to the states in the Constitution. If there is a real and present danger, then preventive action is warranted.

The first two objections set forth above are always well spaced in any presentation by opponents of the amendment, for they are wholly inconsistent. If treaties are now subject to constitutional limitations, then our experience since the inception of our government has demonstrated that treaties need not be tested in the courts to be effective. The fact that other nations knew that there are, or may be, constitutional limitations affecting treaties has not prevented the United States from dealing on an equal basis with the other great nations of the world. To say that the treaty-making power is crippled by the first sentence of the amendment is to say that the treaty-making power should be and is superior to the Constitution, able to supersede or amend it at any time and paramount to every individual right guaranteed in the Constitution and to the distribution of powers between the states and the federal government. While we feel that a proper construction of the Supremacy Clause would render the first sentence of the amendment unnecessary, nevertheless we believe that it has been demonstrated above that there is a real and present danger that a contrary holding by the Supreme Court is not only possible, but probable, and that if we postpone this action as not necessary we may find, too late, that the fundamental liberties of individuals and the fundamental right of local self-government have been emasculated without the prior knowledge or the consent of the people of the United States. Surely, it is not too much to ask that the acts of the President of the United States alone as to executive agreements and the acts of the President and the Senate as to treaties, should be subject to limitations which, if violated, would render those acts void insofar, and only insofar, as they violate the Constitution of the United States.

The third objection to the amendment wholly disregards the fact that the United States is the only major nation in the world in which a treaty is self-executing and becomes effective as internal law without the adoption of implementing legislation. This amendment puts the United States in the same category as Great Britain, France, Italy and othe other nations with which we deal in international affairs. Moreover, this requirement

can have no effect upon the provisions of treaties affecting foreign affairs as distinguished from domestic matters. It is only to the extent that the treaty becomes "effective as internal law in the United States" that Congressional action may be required. There will be no sort of adverse effect within the field of the basic relationship of one nation to another. The right of the regulation of foreign commerce is unquestioned. But the internationalists say that because in a few of our treaties clauses have been inserted affecting "title to land, the statute of limitations, local taxation, the doing of business and regulations as to who could engage in particular occupations," these fields should be open to be withdrawn from the states and regulated without any limitation or restriction by treaties and executive agreements. What was, in past years, a matter of minor importance now assumes the proportions of a threat to our form of government. This has been forcefully pointed out by Mr. Holman as follows:

> "By and through treaty law-making the Federal Government can be thus transformed into a completely socialistic and centralized state. It only requires that the present provisions of the Declaration of Human Rights be incorporated into a treaty, either as an adjunct to the so-called Covenant on Human Rights (which has been suggested) or independently in a separate document.
>
> "Article 22 of the Declaration provides that everyone has 'the right to social security'; Article 23, that everyone has the right to 'just and favorable conditions of work and to protection against unemployment' and that everyone has the right to 'just and favorable remuneration.' Article 24 provides that everyone has the 'right to rest and leisure' and 'periodic holidays with pay.' Article 25 provides that everyone has 'the right to food, clothing, housing, and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age.' Article 26 provides that everyone has the right to education and that 'education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.' In other words, that education in the future shall be an instrumentality for propagandizing the citizens of America and of the world toward the promotion of a collectivist society as set forth in the Declaration. Put these, or similar pronouncements, in treaty form ratified by the Senate, and you have by a few pages of treaty language transformed the Government of the United States into a socialistic state."

Were it not for the fact that the fourth objection is urged with great seriousness by Professor Chafee and other opponents of the amendment, it would hardly be worthy of comment. Any nation dealing with another does so with full knowledge of the restrictions which may limit the treaty-makng authority. In the presence of such an amendment, Great Britain,

France or any other nation would know that if there were any provisions of a treaty designed to take effect as internal law in the United States, such provisions would be effective only upon the passage of legislation which would be valid under the Constitution of the United States, in the absence of the treaty.

Any treaty which has ever been executed by the United States has been subject to whatever constitutional limitations now exist; every such treaty has been executed by the United States with the knowledge that as to internal matters in the other contracting country it would not be effective unless and until it was implemented by legislation adopted by the proper legislative bodies therein. There is no lack of good faith in providing either expressly or impliedly in every treaty that it will not be effective as internal law in the United States unless and until it is implemented by appropriate legislation.

The fifth objection approaches the ridiculous for by it the opponents say in one breath that we will become "contract-breakers" and act in bad faith if we require implementing legislation as a condition precedent to a treaty becoming effective as internal law, and in the next breath say that the amendment is unnecessary for "the moment that Congress decides that a treaty is producing evil results, a majority of both Houses can pass an act ending the internal effect of this treaty." We are urged to act in bad faith, to become express and intentional contract-breakers by permitting treaties to become effective as internal law without implementing legislation, with the plan in mind all the time to break the contract as soon as we dislike its effect. On the other hand, under the modern trends discussed above we have no assurance that the Supreme Court will hold that the internal effect of a treaty can be set aside by subsequent federal legislation. We already know that if a treaty were to completely upset the present balance in the distribution of powers between the states and the federal government, the states would be helpless to affect it by subsequent legislation.

In advancing the sixth reason, Professor Chafee says:

> "If we can not trust the President to refuse to sign a harmful treaty and if we cannot trust the over two-thirds of the senators to refrain from ratifying this bad treaty, then the country will have come to a sorry pass indeed. . . . One of the few sure maxims of government is that you have to trust *somebody*."

The internationalists seem to differ with Thomas Jefferson who said, "In questions of power, let no more be said of confidence in man, but him down from mischief by the chains of the Constitution." They also differ with Woodrow Wilson who said, "The history of liberty is a history of

limitations of governmental power, not the increase of it." The dangers outlined in this article are real and presently exist. Shall we disregard the solemn warnings of Washington, Jefferson and Wilson in order to render the process of treaty-making a little more convenient for the executive branch of the government?

The utter lack of logic of those who oppose this amendment is highlighted by their insistence that an amendment should not be adopted because there has been no change in the field of international relations which would justify an amendment; that the provisions adopted in the Convention at Philadelphia in 1787 are still sufficient as originally drawn. Great stress has been laid upon the debates and amendments considered at that convention. Yet Professor Chafee says:

> "International law has to keep up with life, which refuses to stand still. . . . The conception of international responsibilities upon individuals began with the Nuremberg Trials and the Tokyo Trials, in which our government was a prominent participant."

The conception of international responsibilities upon individuals has brought about the adoption of many articles of the Charter of the United Nations; it has resulted in the Declaration of Human Right; it has resulted in the pending preparation of the Covenant on Human Rights. The Constitutional Convention of 1787 never considered the possibility of the extension of international relations into the field which has suddenly opened within the last decade. It would take rather vivid imagination to depict Benjamin Franklin discussing with Randolph the application of the Supremacy Clause to the Covenant of Human Rights, and Hamilton pointing out to Charles Pinckney that the Declaration of Human Rights might be embodied in a treaty and thereby become "the supreme law of the land and the Judge in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." There have been changes in concepts of the functions of sovereignty and of the meanings of words used in the Constitution which justify and require the use of the amendatory process devised by the framers of the Constitution themselves for use in accommodating that Constitution to the changes which they knew the future would necessarily bring.

Finally, there is no reason why executive agreement should not be subject to the same limitations as treaties. They surely have no greater dignity and their use should be subject to reasonable regulation by Congress.

Watching the judicial trends during the last quarter century has caused many of us to feel that the Constitution of the United States, "like an old

soldier, will never die, it only fades away.' But now we are faced not only by accretion, we are threatened by avulsion. The rock of the Constitution has been worn by many raindrops but it still stands as the guardian of our way of life. If that rock is now overturned, it will be because the people of our country will not heed the warning which has been clearly sounded throughout the land.

AUTHOR'S NOTE:

Acknowledgment is hereby made of the following materials, and reference should be made thereto for a full treatment of the subject matter under discussion in this article: Holman, *Treaty Law-Making,* 36 A.B.A.J. 707 (1950); Ober, *The Treaty-Making and Amending Powers,* 36 A.B.A.J. 715 (1950); Deutsch, *The Peril in the Treaty-Making Clause,* 37 A.B.A.J. 659 (1951); Finch, *Do We Need a Treaty-Clause Amendment?,* 38 A.B.A.J. 467 (1952); Chafee, *Stop Being Terrified of Treaties,* 38 A.B.A.J. 731 (1952); Deutsch, *Need of a Treaty Amendment,* 38 A.B.A.J. 735 (1952); Chafee, *Amending the Constitution to Cripple Treaties,* 12 LA. L. REV. 345 (1952).

Statement of Views before Senate Judiciary Subcommittee by Frank E. Holman, February 18, 1953; Reports of the Standing Committee on Peace and Law Through United Nations, to the House of Delegates of American Bar Association, September 1, 1951, February 1, 1952, September 1, 1952, November 14, 1952, February 1, 1953; Reports of the Section of International and Comparative Law to the House of Delegates of American Bar Association, September 1, 1951, February 1, 1952, September 1, 1952; February 1, 1953; Report and Annex of the Committee on Constitutional Law of the Section of International and Comparative Law, September 19, 1950; Statement in opposition to Senate Joint Resolution 1, 83rd Congress, 1st Session, by representatives of the Association of the Bar to the City of New York; Hearings on "Treaties and Executive Agreements" before a subcommittee of the Judicial Committee of the United States Senate, May 21, 1952 to June 9, 1952.

THE VALUE OF LAW CLERKS

*George D. Braden**

The institution of confidential law clerks for judges deserves more recognition than it has generally received. Most of those who have served as clerks would in all likehood agree that their period of service was both enjoyable and profitable, and it would probably not occur to them that there is opposition within the bar to the practice of engaging law clerks for judges. In view of this opposition, it seems appropriate to take a look at the institution and to see whether it measures up as a valuable adjunct of the American judicial process.

One public expression of opposition occurred at the Annual Meeting in 1952 of the State Bar Association of Connecticut. In the course of a discussion of how to deal with the congested court calendar, the following comment was made:

> "Of course, it may be that we are getting to the point where we have to have a certain number of law clerks, but I think most counsel feel that they would like to argue before the judge who is hearing the case, and not have it decided by some young fellow out of law school, any more than we can help."[1]

An analysis of this sentiment will reveal it to be somewhat on the weak side. It is not unlike a client refusing to consult an attorney who has a "young fellow out of law school" working for him for fear the attorney might take the young fellow's advice. Perhaps the old adage has been changed to read that two heads are better than one except when one of the heads is fresh out of law school.

The end result of the judicial process, a decision, is presumably all that is important. If a judge has a competent law clerk to help him, his decision ought to be better than would be the case if the judge had to work alone. A lawyer is naturally interested in winning his case and to that end puts forth his best arguments. But he can hardly take the position that a judge is forbidden to consider any arguments not presented by counsel. The bar certainly expects the bench to make an effort to come up with the best possible solutions to the legal puzzles presented to them. A bright young fellow right out of law school can be of great value to the harrassed judge, and to fear such a clerk's influence is, if anything, to indict the judge as too weak to know his own mind.

The quotation given above comes from a discussion involving nisi

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[1]Proceedings of the Annual Meeting, 26 Conn. Bar J. 428, 451 (1952).

prius judges, and the argument there given against law clerks is even less apt for collegiate appellate courts. If it seems unlikely that a law clerk will in fact decide a case for a nisi prius judge, a fortiori the clerk has no such influence with several judges. Interestingly enough, not only does the argument against law clerks lose its force when appellate courts are considered, but there the need for clerks is actually increased. The nisi prius judge, except in large metropolitan centers, is seldom pressed to make in rapid fire succession a number of rulings important enough to justify extensive research. An appellate court usually has only cases that are worthy of considerable thought if they are worthy of any thought at all. If serious study and extensive research are required, law clerks are a distinct asset to the appellate judge.

There are many things a law clerk can do, and there must be as many different relationships between judges and clerks as there are judges. The least that a clerk can do is to prepare memoranda on points of law. A judge who keeps his counsel may do no more than send his clerk off to the library on specific questions. This is not the richest relationship between judges and clerk, but it is the basic one. A law clerk is a time-saver for a judge, and the greatest time-savings is in research. If the appellate judge is at all pressed for time, the presence of a competent clerk may spell the difference between sloppy and workmanlike opinions.

A clerk is also a valuable sounding board. A judge who has confidence in his clerk can discuss pending cases with him. In the United States Court of Appeals for the Second Circuit, for example, many judges discussed cases with their clerks immediately after oral argument and prior to the conference at which the judges tentatively came to a decision.[2] Sometimes a clerk may make an actual contribution to the decision of the case, but more frequently he simply serves as a partner in conversation. Discussion of a case serves to clarify a man's thoughts, and a clerk can be of great value to a judge by asking pointed questions, posing alternatives, and generally acting as a devil's advocate. The net result of this sort of collaboration may be that the law as handed down differs in some respect from what would be the case were there no clerk with whom to discuss the case. But this is no reason to oppose clerks, for the law as handed down may differ if a judge engages in a greater or lesser amount of research, if he discusses a case with a fellow judge not sitting, or even if he

[2]Some judges required their clerks to attend oral argument. My judge felt that oral argument did not contribute much, and except for unusually important cases involving arguments by famous advocates, I always spent the oral argument period reading the briefs in the cases argued. When the judge returned from argument he and I would talk over the cases, he on the basis of the argument, I on the basis of the briefs. We found it an eminently satisfactory procedure. I was particularly pleased to be relieved of attending oral arguments, for the truth is that most of the arguments were poor.

discusses the case in the abstract with a trusted friend. There are too many factors influencing judicial decisions to place much emphasis on the occasional contribution of a law clerk.

Actually, the law clerk ought to be welcomed for the very thing which he brings to the bench—a fresh look. A recent graduate from law school is, to be sure, innocent in the practical way of the law, but he is also likely to be learned in what may be called the frontiers of the law, the new ideas being evolved in the halls of the scholars of the law. The law develops, as it must if it is to meet the needs of a changing society, and the judges who pronounce the law need all the help that they can get in keeping the law abreast of the times. Counsel who argue before them may on occasion present a new idea,[3] but by and large the advocate is not sufficiently detached to view the issue in a large setting. The judge has the obligation to view the case before him in its relation to the law as a whole and to render a decision that adds to the whole law. Addition, here, can only mean slight, almost imperceptible, adjustments of the law of the past to the needs of today. The judge who has sat on the bench for ten years or more and the new judge with several decades of practice behind him are both tied to the past more than is good for the law.[4] The law clerk, fresh with all too many ideas of what is wrong with the law and what ought to be changed, is the perfect antidote to the tired judge who has heard all the arguments many times before. Together law clerk and judge can temper the ancient rules with the advanced ideas coming out of the law schools.

In the actual drafting of opinions law clerks can be of great service. Although the lawyer deals in a verbal world and places great emphasis on accuracy of language, he does not necessarily succeed in writing clearly. Judges, especially if overworked, are likely to turn out opinions that for clarity leave something to be desired. Much that the lawyer writes is both ephemeral and directed towards a limited audience; much that the judge writes is permanent and read by many. More to the point, lawyers looking for all shades and nuances of meaning read the judge's words with a magnifying glass.[5] A well-trained law clerk, especially one who has had considerable law journal experience, can aid his judge in polishing the language of opinions and in spotting ambiguities and other slips that may return to plague the court later. Even a judge who is a precise and clear

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[3]See TWISS, LAWYERS AND THE CONSTITUTION (1942), a doctoral dissertation on the thesis that in American constitutional law the advocates introduced most of the concepts that became ruling doctrines in the Supreme Court.

[4]Of course, there are the great judges who are forever young, whose very fresh approach is what makes them immortal. But even here, the alert law clerk may almost unwittingly provide the spark that produces an outstanding opinion.

[5]There was one matter which came to the Second Circuit twice during the year I clerked there. On the second hearing I was appalled at the meanings read into our earlier opinion by opposing counsel.

drafter can use an editor, for the best of us can be misled by our own words and feel sure that what is crystal clear to us is equally clear to all who read.

In some instances judges may even give to their clerks the actual task of drafting opinions. In most cases judges draft their own opinions, relying on supporting memoranda from their clerks. But if a judge has confidence in his clerk, and the clerk has the ability to cast language in the idiom of his judge, it seems appropriate for the judge after thorough discussion simply to have his clerk prepare the first draft of the opinion. The end result in both instances should be the same: there is mutual discussion of the problem, research into the law, drafting of an opinion, and editing of the opinion. In some ways, however, letting the law clerk draft the opinion is preferable, for it cuts down the time consumed in opinion writing. A judge can more quickly polish a draft opinion than he can recast a memorandum on the case.

Up to now I have spoken only of the value of law clerks to the bench. To the clerks themselves the experience is almost priceless. Those able students chosen to clerk for a year or two receive a postgraduate education of considerable value. The significant and difficult legal problems before the court provide admirable training in legal analysis. Participation in the decision-making process affords an insight into the workings of the law which cannot be obtained in any other way. And the personal relationship between judge and clerk can be most enjoyable and profitable to the young lawyer. On all counts the institution of law clerks is as valuable to the clerks and the law schools from which they come as to the bench which they serve.

There is one drawback to the clerk system. It is somewhat of a strain on a judge to train a new clerk each year. In the United States Supreme Court the justices have recently increased the number of clerks to two for each justice and the period of service normally to two years on a staggered system so that each year there is one experienced clerk and one new clerk for each justice. In a state court system two clerks each would appear both unnecessary and too costly. On the other hand, service for more than one or two years should not be encouraged. A professional clerk who stays on for years can hardly be of the caliber of the recent graduate who views his services as a continuation of his education. What the judge gains in ease of administration he loses in quality of service. The ideal system is one which places such emphasis on the prestige of clerkship that the best graduates are encouraged to serve.[6]

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[6]In one instance that I know of a New York law firm gave a graduate a year's leave of absence before he started to work in order that he might serve as a law

Institutions grow most frequently from small, almost accidental, beginnings. We have come a long way since Justice Holmes first started the practice of picking a clerk, or secretary as he was then called, each year from the top graduates of the Harvard Law School. The number of courts, state and federal, now following Holmes' custom increases year by year. Considering the value of the institution, this is not surprising, for it is one from which the bench, the bar, the law schools, and the public all profit.

clerk and when he first came on the job a year later he was given a larger salary in recognition of his additional experience.

THE FIRST YEAR OF THE UNITED STATES COURT OF MILITARY APPEALS

*A. B. Butts**

Introduction

The Uniform Code of Military Justice became law on May 5, 1950[1] The Code provided that the article creating the Court of Military Appeals should be effective on February 28, 1951, though the court could not act until after May 31, 1951.[2] The court heard its first appeal on September 7, 1951.[3]

The period covered in this article is May 31, 1951, to December 31, 1952.

Under the Code a single new court, which is composed of three civilian judges appointed by the president for fifteen-year terms[4] and wholly separated from military command, is the court of last resort for all branches of the Armed Forces.

The three judges of the United States Court of Military Appeals, the first civilian court in the United States exercising jurisdiction in military offenses, are Judge Robert E. Quinn, Chief Judge, Judge George W. Latimer, and Judge Paul W. Brosman. At the time the appointments were made Judge Quinn, a former governor of Rhode Island, was serving as a member of the Supreme Court of Rhode Island, Judge Latimer as a

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[1]This is the fifth article on the subject of military courts and the administration of military justice by the writer to appear in the Mississippi Law Journal. See Butts, *The Judge Advocate General's Department of the United States Army,* 15 Miss. L. J. 113 (1943); Butts, *How the Army Transforms Lawyers Into Judge Advocates,* 16 Miss. L. J. 21 (1943); Butts, *The Judge Advocate General's Corps of the United States Army,* 21 Miss. L. J. 203 (1950); Butts, *The Uniform Code of Military Justice,* 22 Miss. L. J. 3 (1951).

[2]U.C.M.J. art. 140(b)(5). The Uniform Code of Military Justice may be found set forth in 64 Stat. 107, 50 U.S.C. § 551 *et seq.* (1950).

[3]U. S. v. McCrary, 1 U.S.C.M.A. 1 (1951) (United States Court of Military Appeals). The first case to reach the court was *U. S. v. McSorley,* which was docketed July 8, 1951, about five weeks after the effective date of the Uniform Code of Military Justice.

[4]The first three judges to have staggered terms of fifteen, ten, and five years; Judge Quinn for the fifteen-year term, to expire May 1, 1966; Judge Latimer for the ten-year term, to expire May 31, 1961; Judge Brosman for the five-year term, to expire May 31, 1956. Judges are eligible for reappointment. Under U.C.M.J. art. 67, not more than two of the judges may be appointed from the same political party; the present court is composed of two Democrats (Judges Quinn and Brosman) and one Republican (Judge Latimer).

member of the Supreme Court of Utah, and Judge Brosman as Dean of the Law School of Tulane University. No mention of military experience as a requirement for appointment as a judge of the military "supreme court" is made in the Uniform Code of Military Justice, but it is interesting to note that each of the three judges has had varied and extensive experience with military affairs and in the administration of military justice—Judge Quinn as a Naval Reserve captain and legal officer, Judge Latimer as an Army Reserve colonel, and Judge Brosman as a judge advocate colonel of the Air Force.

The court held its initial meeting on June 22, 1951, for the purpose of organizing and outlining a method of operation.[5] Work was immediately commenced on rules of practice and procedure,[6] and soon the rules were announced, thirty-three in number, effective July 11, 1951, and were increased to fifty-eight in number as revised on March 1, 1952.

Two other tasks were necessary before the processing of cases started: the employment of personnel and procurement of temporary quarters.

The court has a staff of approximately forty employees, all civilians, sixteen of whom are lawyers. The sixteen lawyers of the staff are: the Clerk of the Court (Mr. Alfred C. Proulx), the Deputy Clerk of the Court, six commissioners, five attorney-advisers, and three law clerks.

Since September 15, 1952, the court has occupied all of the building at "E" and Fifth Street, North West, Washington, D. C., formerly occupied by the United States Court of Appeals for the District of Columbia Circuit, that court having moved into the new Federal Courts Building on Constitution Avenue. Prior to September, 1952 the Court of Military Appeals occupied temporary quarters on the seventh floor of the Internal Revenue Building in order to be near the courtroom of the United States Court of Customs and Patent Appeals, which was used temporarily and on a part-time basis by the Court of Military Appeals.

Judges of the Court of Military Appeals receive the salary of judges of the United States Courts of Appeals ($17,500) and in general rank with members of that bench. Legislative intent in this respect may be assumed from the fact that the president may designate a judge of the United States Court of Appeals to fill the office for the period of disability of

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[5]Interim Report, U. S. Court of Military Appeals, submitted to the committees on Armed Services of the Senate and of the House of Representatives, and to the Secretaries of the Departments, pursuant to the Uniform Code of Military Justice, for the period May 31, 1951, to May 31, 1952, p. 1.

[6]United States Court of Military Appeals, Rules of Practice and Procedure, prescribed pursuant to U.C.M.J. art. 67; see pamphlet published by the court "United States Court of Military Appeals, Rules of Practice and Procedure, Revised March 1, 1952."

any judge of the Court of Military Appeals who is temporarily unable to perform his duties because of illness or other disability.[7]

The court is not a part of the regular federal court system. It derives its jurisdiction under the "war powers" of the Congress as set forth in Article I of the Constitution at Section 8. Administratively, it functions under the Department of Defense instead of the Administrative Office of the United States Courts.

Illustrative of the system of military courts of the three services of the Armed Forces is the Army system of courts, from trial courts to the court of final jurisdiction. These courts are:

(1) The trial courts or courts of first-instance, which are: summary courts-martial, which are one-officer courts for handling minor delinquencies committed by servicemen; special courts-martial, which are the intermediate trial courts with limited jurisdiction; general courts-martial, which constitute the major criminal courts of original jurisdiction, or courts of first instance, of the system of military courts.

(2) The boards of review are in essence courts of intermediate appellate jurisdiction. Currently there are seven Army boards of review,[8] constituted of three officers appointed by The Judge Advocate General, one of whom is designated as chairman, and exercising jurisdiction as prescribed by Article 66 of the Uniform Code of Military Justice.

(3) The United States Court of Military Appeals is the final court of review, with specific statutory jurisdiction.

Jurisdiction

The Court of Military Appeals must review all death cases, cases affecting generals and admirals, and board of review cases which a Judge Advocate General of one of the Armed Services certifies to it. In addition, any accused may petition the court for a review and the court may, on good cause shown, grant a review. The specific requirements of the Uniform Code of Military Justice direct that the court shall review the following classes of cases from the Army, the Air Force, the Navy (including the Marine Corps), and the Coast Guard:[9]

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[7]U.C.M.J. art. 67(a)(4).

[8]There are eight Air Force boards of review and seven Navy boards of review.

[9]U.C.M.J. art. 67(b)(1),(2),(3). See Manual of Courts-Martial § 101 (1951).

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or a flag officer or extends to death;

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

Procedure

Procedural rules for the court are provided in three places: (1) the Uniform Code of Military Justice, (2) the 1951 Manual for Courts-Martial, and (3) the Rules of Practice and Procedure prescribed by the court.[10]

The procedure in the military system is quite similar to that prescribed by civilian courts. Reference to the steps through which a case passes in the courts-martial system for a general court-martial case will indicate the similarities.

(1) Pre-trial steps: There is always a pre-trial investigation; advice given to the accused as to the charges against him, and as to his right to have counsel present during the preliminary stages; information furnished the accused that he need not make a statement regarding the offense nor make any statement that tends to incriminate him, and that he need not answer immaterial and degrading questions.

(2) Referring case to trial: If the investigation indicates that an offense has been committed and that the accused should be tried, the staff judge advocate confers with the "convening authority" before the case is referred to trial—a procedure similar to that in civilian practice where a county or district attorney determines whether criminal action is justified.

(3) The plea: The cause is tried when the plea is entered. Military counsel is provided without cost to the accused, as a part of the requirements under the Uniform Code of Military Justice that present in every general court-martial there must be three lawyers—trial counsel (formerly known as the T.J.A., or trial judge advocate), defense counsel, and the law member of the court (the law member is substantially the judge).

(4) Rights of the accused: The accused is entitled to challenge any

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[10]U.C.M.J. art. 67; Manual for Courts-Martial § 101 (1951); pamphlet published by the court, "United States Court of Military Appeals, Rules of Practice and Procedure, Revised March 1, 1952."

member of the court-martial (in effect, the jury) for cause and one peremptorily. He cannot be convicted of an offense which carries a mandatory death sentence, except by concurrence of all members of the court, and in other cases two-thirds of the members must agree before a finding of guilty can be reached; a sentence of ten years or more requires concurrence of three-fourths of the members, while a sentence involving less than ten years requires two-thirds concurrence of members.

(5) Review by the commander: The findings of the court and the sentence must be approved by the reviewing authority (the convening authority who ordered the trial and appointed the general court-martial), who has the power to approve only such findings of guilty and sentence as he finds correct in law and fact, and as he in his discretion determines should be approved (the staff judge advocate advises the commander on all legal points).

Immediately following the close of the trial, the last step being approval by the convening authority or officer who appointed the court and ordered the court-martial trial, the steps in the appellate procedure begin.

To chart further the procedural steps before a case reaches the Court of Military Appeals, the following outline traces the exact steps through which the first case to be heard by the court[11] passed:

Mickey McCrary, private in the United States Air Force, the accused, (1) left his station at Camp Stoneman, California, on October 23, 1950; (2) surrendered to Air Police at Brookley Air Force Base, Alabama, on December 22, 1950; (3) was charged with "desertion by absence without leave with intent not to return" and was tried by general court-martial at Keesler Air Force Base, Mississippi; (4) was found guilty of desertion; (5) was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year and six months. Following these steps, the automatic appeal machinery was set in motion, with the results that (1) the convening authority reduced the period of confinement to six months and suspended the dishonorable discharge; (2) the Board of Review sustained the finding and approved the sentence as reduced; (3) The Judge Advocate General of the Air Force certified to the Court of Military Appeals the question of whether, as a matter of law, the facts were sufficient to sustain the conviction.

The sole issue before the Court of Military Appeals was the question of intent, that is, whether the court-martial could reasonably infer, from facts presented, an intent on the part of the accused permanently to remain away from the military service. Mickey McCrary obviously was

[11]U.S. v. McCrary, 1 U.S.C.M.A. 1 (1951).

guilty either of desertion (under Article 85 of the Uniform Code of Military Justice) or of the lesser offense of absence without leave (under Article 86 of the Code).

At the trial this substantially is what happened: (1) the prosecution introduced documentary proof (extract copy of the morning report) that the accused left his organization, the 2349th Overseas Replacement Squardron; (2) the parties stipulated that the accused surrendered to military authorities at a date two months after his departure; (3) the prosecution rested; (4) the accused elected to remain silent; (5) no other evidence was presented.[12]

The Court of Military Appeals by a two to one vote upheld the judgment of the Board of Review, which had sustained the finding and approved the sentence as reduced by the convening authority, and produced three opinions in this, the first case decided by the new civilian court: the opinion of the court (Judge Latimer), a concurring opinion (Judge Brosman), a dissenting opinion (Chief Judge Quinn).

It should be noted that the appeal was automatic through the first two of the four steps: to the commanding officer (convening authority) and to the Board of Review. In the *McCrary* case the third step in appellate procedure, in so far as the accused was concerned, was also by automatic appeal. It might also be noted that the accused could have exercised his right to have counsel file a petition (certiorari) for a hearing before the Court of Military Appeals. Attention, too, might here be directed to the fact that the government furnishes defense counsel, without cost to the accused, before the court-martial (trial court), before the board of review (intermediate appellate court), and before the Court of Military Appeals (supreme court).

Other matters of importance in appellate procedure might be noted. After approval by the reviewing authority (the commander) the entire record is forwarded to the Judge Advocate General of the appropriate service. The case is then set for hearing before a board of review composed of three judges—three judge advocate officers before the Army and the Air Force boards of review, and three Navy legal officers or two legal

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[12]In *U.S. v. McCrary,* 1 U.S.C.M.A. 1 (1951), its very first opinion, the court warns counsel that they must not expect the Court of Military Appeals to place their "stamp of approval upon a procedure which barely meets the minimum standards required for a law suit" and the court states further that since "the sentences meted out by courts-martial take away fundamental rights of the accused and place them in confinement for long periods of time . . . counsel should not be satisfied to meet minimum requirements but should prepare their cases well and strive to win fairly by presenting adequately and properly any relevant and material fact which is reasonably available."

officers and a civilian lawyer before Navy boards of review.[13] Counsel, military and civilian, if the accused desire to have civilian counsel, appear for the accused and military counsel for the government.

Corresponding to civilian intermediate courts of appeal are the boards of review. They have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing the fact that the trial court saw and heard the witnesses. The boards of review affirm only the findings of guilty and the sentence, or such part or amount of the sentence as it finds correct in law and fact and which it determines, on the basis of the entire record, should be approved.[14]

The final step in the appellate procedure is an appeal to the United States Court of Military Appeals.[15] In cases where the accused himself files the appeal a short brief and memorandum of authorities accompanies the petition, which is in substance a petition for certiorari. The accused has thirty days from the time he is notified of the decision of the board of review in which to file the petition, and it is required that the court pass upon the petition within thirty days after it is received.[16] There is no mandatory time of action by the court in the other three classes of cases which come before the Court of Military Appeals, *i.e.,* cases involving generals and admirals (flag officers), death cases, and cases in which questions are certified to the court by the Judge Advocates General of the three services.[17]

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[13]Kent, *The Boards of Review of the Armed Services,* 6 VAND. L. REV. 241, 250 (1953), where he calls attention to the fact that "at the focal point stand the boards of review, entrusted with the duty of appellate examination of all serious cases . . . and upon (them) rests the responsibility of the proper application of existing law in keeping with the spirit of the American legal tradition so as to insure the maintenance of a high standard of discipline in our armed services." Boards of review were established in the Army in 1920, while no boards of review existed in the Navy until the adoption of the Uniform Code of Military Justice. Prior to the Code, boards of review were composed entirely of officers. Currently only the Navy has exercised the right accorded by U.C.M.J. art. 66 to appoint civilian lawyers as members of the boards of review, which section provides that the Judge Advocate of each of the Armed Forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a federal court or of the highest court of a state of the United States. There now exist twenty-two boards of review: seven Army boards, eight Air Forces boards, and seven Navy boards. Each of the Navy boards is constituted of two Navy officer lawyers and one civilian lawyer.

[14]MANUAL FOR COURTS-MARTIAL § 100 (1951); U.C.M.J. art. 66(c).

[15]Latimer, *Military Justice,* 45 LAW LIBRARY JOURNAL 148 (1952).

[16]U.C.M.J. art. 67(c); United States Court of Military Appeals, Rules of Practice and Procedure, Revised March 1, 1952; Rule 22(b) reads: "A Petition for Grant of Review shall be deemed to have been filed upon the date postmarked on the envelope containing the petition, or upon the date when the petition is deposited in military channels for transmittal."

[17]Each of the services of the Armed Forces has its own Judge Advocate General, and except where the Coast Guard is operating as a part of the Navy, the term "Judge Advocate General" includes not only the three Judge Advocates General (Army, Navy, Air Force) but also the General Counsel of the Treasury Department, of which department the Coast Guard for some purposes operates as a part.

Action which may be taken by boards of review (the intermediate appellate courts) are: (1) approve a holding as it came from the general or special court-martial, (2) reduce the sentence, (3) disapprove the findings in whole or part, (4) order the case dismissed, or (5) order a rehearing, except where the findings are disapproved for insufficient evidence.[18]

Actions which may be taken by the Court of Military Appeals, which unlike boards of review may take action only with respect to matters of law,[19] are: (1) affirmance, or (2) setting aside the findings and sentence. If the Court sets aside the findings and sentence, it may dispose of the case in either one of three ways: (1) by ordering a rehearing, except that such may not be done where the setting aside is based on lack of sufficient evidence in the record to support the finding; (2) by ordering the charges dismissed; or (3) by directing the Judge Advocate General of the service concerned to return the record to the board of review which previously considered the case for further review in accordance with the court's decision. When a rehearing is ordered, the convening authority (the commander who appointed the court) may dismiss the charges if he finds that a rehearing is impracticable.

Cases which are reviewed by the Court of Military Appeals are executed following affirmance by the court, except (1) in sentences extending to death or involving a general or flag officer (admiral) the sentences may not be executed until they are approved by the President, and (2) in sentences extending to dismissal of an officer, cadet, or midshipman the sentences may not be executed until they are approved by the secretary of the department concerned (Army, Navy, Air Force).

Docket of the Court

Currently there are in the Armed Forces, subject to the Uniform Code of Military Justice, approximately three and a half million men and women. Moreover, there are over a million civilian employees of the Services, some of whom might be affected by the provisions of the Code.[20] There are more than 100 offenses the conviction of any one of which may be punished by confinement for more than a year. In addition, there are 27 other offenses which, though not punishable by confinement for one year or more, are punishable by a dishonorable or bad conduct discharge.[21] These figures are significant in considering the question of how

[18]U.C.M.J. art. 66(d).
[19]U.C.M.J. art. 67(d).
[20]Latimer, *supra* note 15, at 159; 43 The Journal of Criminal Law, Criminology and Political Science of Northwestern University 3 (1952).
[21]Bearregard, *The New United States Court of Military Appeals,* 57 Case and Comment 3 (1952). It should be noted that military justice is now embraced in a

many cases will reach boards of review and, though a much smaller number,[22] how many cases will reach the Court of Military Appeals.

In effect, any act of a person subject to the Code which violates the military law of the country may possibly reach Court of Military Appeals, either by specific mandate of the Code, forwarding action by a Judge Advocate General, or petition of the accused.

The court began processing appeals in September, 1951. The first case to be heard by the court was argued on September 7, 1951, and the court rendered its first decision on November 8, 1951. This was the case of *U. S. v. McCrary*.[23] In answer to the question, Where do the cases before the United States Court of Military Appeals come from? the answer is: from the general and special courts-martial, which are the principal trial courts of the military services.[24] No case comes to the Court of Military Appeals until it has been heard before one of the twenty-two boards of review of Army, Navy, and Air Force. As would be expected, there are few death sentences, even in wartime. From the other source of cases under the court's mandatory jurisdiction, very few generals and admirals become personally involved in courts-martial proceedings. For the period here covered, of the twelve mandatory cases all were death cases. A larger number of cases comes to the court from the certificate jurisdiction. Of this jurisdiction one of the judges of the court has said that this source will not burden the court unduly so far as numbers are concerned, although cases under this jurisdiction will tend to have to do with sharp differences in matters of substance and practice.[25] The vast majority of cases comes to the court by petition of the accused, whose conviction by general or special court-martial has been upheld by a board of review.

The following statistics reflect the number, status, and disposition of cases processed during the first sixteen months operation of the United States Court of Military Appeals.[26]

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single system, whereas civilian criminal justice is divided among 48 separate systems and a federal system.

[22]For the period May 31, 1951, to May 31, 1952, of the cases decided by boards of review, for the Army, 12.6 percent were forwarded to the United States Court of Military Appeals pursuant to U.C.M.J. art. 67(b); 3.2 percent from the Air Force; 3.23 percent from the Navy; 6.4 percent from the Coast Guard. See Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces, pursuant to the Uniform Code of Military Justice, for the period May 31, 1951, to May 31, 1952.

[23]1 U.S.C.M.A. 1 (1951).

[24]Summary courts-martial (a one-officer court) handle only minor deliquencies.

[25]Judge Paul W. Brosman, address delivered before a convention of Phi Alpha Delta legal fraternity, Chicago, August 29, 1952, reported in THE REPORTER, official publication of the fraternity, October 1952, p. 6.

[26]The writer is indebted to Mrs. Raymond Brown, Docket Clerk, United States Court of Military Appeals, for valuable assistance in the preparation of this section of the article. Statistics appear in the Annual Report of the United States Court of

For the period May 31, 1951, to December 31, 1952, the total number of cases docketed was 2,072. Of this number, 1,810 came from general courts-martial.

Of the 2,072 cases, 321 were docketed in the calendar year 1951 (May to December, 1951), leaving the number of cases docketed for the calendar year 1952 at 1,751. Of the 2,072 cases, 1,970 were petitions (for certiorari) by the accused, 107 cases came to the court by certificate from the Judge Advocates General; 12 cases involved death sentences. Hence, 1,970 cases came to the court under its discretionary jurisdiction and 119 cases under its mandatory jurisdiction.[27]

Of the 1,970 petitions (for certiorari), 245 were granted, and 1,445 denied (the remaining number were pending).[28] Of the 107 certificates, 70 were heard, and the remaining 37 are pending.[29] Of the 12 death sentences, the court action as of December 31, 1952, stood: 7 heard; set for hearing, 1; ready to be set for hearing, 1; awaiting briefs, 3.[30]

As of December 31, 1952, there were 178 published opinions,[31] 1,650 completed action, and 434 pending completion.

Of the 1,970 cases docketed, over 1,500 were from the Army, decidedly the largest of the Armed Forces, over 300 from the Navy (including Marine Corps), nearly 200 from the Air Force, and ten from the Coast Guard. The twelve death cases were from the Army.

On December 31, 1952, over 1,600 actions had been completed by the court, while the court's docket at that time stood as follows: pending completion, 434 cases, with the more complete picture showing petitions granted and awaiting briefs, 25; petitions on which court action was due (30 days), 168; petitions awaiting briefs, 87; certificates awaiting briefs, 18; mandatory cases awaiting briefs, 3; ready to be set for hearing, 40; set for hearing, 24.

It is interesting to note, in discussing the work load of the new

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Military Appeals and the Judge Advocates General of the Armed Forces, pursuant to the Uniform Code of Military Justice, for the period May 31, 1951, to May 31, 1952, at p. 10; other statistics given here are from current records in the Office of the Clerk of the Court.

[27]The slight discrepancy (17) in numbers which will be noted here arises from the fact that 13 of the cases are counted as both petitions and certificates, and four dockets were submitted as petitions for the second time.

[28]U.C.M.J. art. 67(b)(3).

[29]U.C.M.J. art. 67(b)(2).

[30]U.C.M.J. art. 67(b)(1).

[31]Dockets 1 and 2 were disposed of by one opinion (No. 17). Current opinions of the Court of Military Appeals are published in "Court-Martial Reports—The Judge Advocates General of the Armed Forces and the United States Court of Military Appeals." This publication also contains the holdings and decisions of the Judge Advocates General of the Services, and the boards of review. Volumes of the published opinions of the Court will be made available as U.S.C.M.A. Reports.

Court of Military Appeals, brief statistics of the United States Supreme Court. For the 1950 term of the Supreme Court 1,207 cases were docketed; of that number 989 were petitions for certiorari, of which number 105 petitions were granted, and 884 denied; 131 cases were argued; the Court handed down 91 written opinions, disposing of 114 cases. The statistics for the 1951 term of the Supreme Court were: 1,233 cases docketed, of which number 1,016 were petitions for certiorari, of which number 112 were granted and 904 denied; 129 cases were argued; the Court handed down 83 written opinions, disposing of 98 cases.

Attention also might be called to the work load of the United States Court of Appeals for the District of Columia Circuit, which has the largest docket of the eleven Circuit Courts of Appeal: 392 cases in the fiscal year 1951, and 439 cases in the fiscal year 1952. In each fiscal year there is a small carry-over of cases from the year before: 422 cases were terminated in 1951, of which number 238 were by opinion and 184 by dismissal; 467 cases were terminated in 1952, of which number 279 were by opinion and 188 by dismissal.

Decisions of the Court

It is not the purpose of this article to analyze or discuss in detail the decisions of the Court of Military Appeals. An examination of the 178 cases in which opinions were written in the first period of slightly over a year of the operation of the court reveals that opinions of the court deal largely with problems of procedure and issues concerning rules of evidence.[32]

Reference here is made to only a few of what are considered to be the more important decisions and opinions of the court, ones which should bring about improvement in the performance of their duties by members of general and special courts-martial and counsel serving as law members and as government and defense counsel in general courts-martial.

In *United States v. McCrary*[33] courts-martial and counsel are admonished that the record as it comes up to the Court of Military Appeals must show that the evidence is sufficient to sustain the holding. In *United States v. Uchihara,*[34] involving a similar situation and with the court split in the same manner as in the *McCrary* case, the court affirmed the decision of the board of review, re-emphasizing the importance of a full development and presentation of evidentiary facts in the trial courts, and the

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[32] 6 Vand L. Rev. 237 (1953). This issue of the Vanderbilt Law Review is devoted entirely to a symposium on military justice.
[33] 1 U.S.C.M.A. 1 (1951).
[34] 2 C.M.R. 29 (1952) (Court-Martial Reports).

necessity of having the facts in the record which goes up to boards of review and to the Court of Military Appeals.

In four cases (decided November 8, 1951), *United States v. Lucas*,[35] *United States v. O'Brassill*,[36] *United States v. Bishop*,[37] and *United States v. Goodrich*,[38] all certified by the Judge Advocate General of the Navy, the court considered the procedure required of courts-martial in cases where a guilty plea has been entered. In these cases the board of review reversed the conviction, grounds for reversal being that the president of the court had usurped the powers of the law member of the general court-marital in regard to instructing and charging the court, and failure to close the court to take a secret ballot on the question of the accused's guilt. The court upheld the convictions on the ground that, though these acts of the trial courts constituted errors of law, they did not materially prejudice the substantial rights of the accused. The court, speaking in the *Lucas* case, based its conclusion on the holding of the United States Supreme Court in *Kotteakos v. United States*[39] and on the rule followed in most federal and state courts that if the guilty plea is regularly made there remains to the court only the duty of imposing an appropriate sentence.[40]

The failure of the president of a Navy special court-martial[41] to charge the court on the elements of the offense, the presumption of innocence, and the burden of proof in a case where the accused had pleaded not guilty, constituted reversible error, said the Court of Military Appeals in *United States v. Clay*.[42] This case is a notable one because the court lays down certain minimum requirements, similar to those developed in federal civilian cases, which it will require courts-martial to meet. These requirements it labels "military due process."[43]

The question of the admissibility into evidence of confessions came before the court in *United States v. Monge*.[44] The holding on the facts

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[35] 1 C.M.R. 19 (1951). These four cases were, with the *McCrary* case, on the docket for argument September 7, 1951, the first day oral arguments were heard by the court.

[36] 1 C.M.R. 27 (1951).

[37] 1 C.M.R. 29 (1951).

[38] 1 C.M.R. 26 (1951).

[39] 328 U.S. 750 (1946); see 1 Advance Opinions of the United States Court of Military Appeals 23 (1951-1952), for the language used by Mr. Justice Rutledge of the United States Supreme Court on this point.

[40] Mullally, *Military Justice: The Uniform Code in Action*, 53 Col. L. Rev. 1, 18 (1953).

[41] The Code does not require that a special court-martial have a lawyer as a member of the court and hence the president of the special court-martial is charged with the duty of instructing the court on the elements of each offense charged, the presumption of innocence, and the burden of proof. See Manual for Courts-Martial § 73(b) (1951); U.C.M.J. art. 51(c).

[42] 1 U.S.C.M.A. 74 (1951).

[43] Wurfel, *Military Due Process: What Is It?*, 6 Vand. L. Rev. 251 (1953).

[44] 2 C.M.R. 1 (1952).

and the dicta in this case constitute an important extension to the concept of military due process as enunciated in the *Clay* case.

In *United States v. O'Neal* [45] the court dealt with the question of standards to be applied in determining the quantum of evidence sufficient to support a finding of guilty. The court adopted the "reasonable hypothesis rule" rather than the "substantial evidence rule" or the "old scintilla rule." Here again the court split, with a two to one decision, Judge Brosman speaking for the court, a concurring opinion by Judge Quinn, and a dissenting opinion by Judge Latimer.[46]

An undesirable practice which had grown up, that of presenting to each accused after the announcement of the decision of a board of review affirming his conviction a mimeographed form of waiver of his rights to appeal to the Court of Military Appeals, was branded a "legal nullity" by the court in *United States v. Ponds*.[47]

The Bar of the Court

In order to appear before the Court of Military Appeals as counsel, attorneys, whether military or civilian, must have been formally admitted to the practice before the court. As of December 31, 1952, the court had a bar of 879 lawyers. Of that number 591 are associated with the military,[48] that is, officers of the regular establishment or reserve officers on extended active duty. The remaining 288 are civilian lawyers, some of whom are reserve officers of one of the services of the Armed Forces, though many of them have no military connection whatever.

Currently there are approximately 1,200 officers in the Army Judge Advocate General's Corps, of which number about 900 devote substantially their full time to the administration of military justice, which embraces other duties than those connected with trials by courts-martial.[49] Military lawyers, it should be borne in mind, perform a multitude of legal duties in no way connected with the administration of military criminal law, though as the figures here indicate about three-fourths of the lawyers

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[45]Docket No. 25, decided February 7, 1952.

[46]Wurfel, *supra* note 43, at 254.

[47]3 C.M.R. 119 (1952); see Landman, *A Year of the Uniform Code of Military Justice: A Report of Progress*, 4 Stan. L. Rev. 490, 496 (1952), for a discussion of decisions of the court in its first year of operation.

[48]The 591 military lawyers include 306 from the Army; 179 from the Navy, including the Marine Corps; 98 from the Air Force; 8 from the Coast Guard.

[49]Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces, pursuant to the Uniform Code of Military Justice, for the period May 31, 1951, to May 31, 1952, p. 18. Of the 1,200 judge advocate officers, about 450 are Regular Army judge advocates, and they rank from major general to first lieutenant; there are five general officers: two major generals (one of whom is The Judge Advocate General) and three brigadier generals.

of the Army Judge Advocate General's Corps devote practically all of their time to military justice.

To illustrate the different phases of the work of lawyers of the Armed Forces, there are ten divisions of the Army Judge Advocate General's Corps, with four of the divisions devoting full time to military justice: (1) military justice, (2) new trials, (3) defense appellate, (4) government appellate. The remaining six divisions are (1) military affairs, (2) war crimes, (3) patents, (4) lands, (5) procurement, (6) claims and litigation. The military affairs division has three branches which furnish advice and opinions with respect to the status of military and civilian personnel, international legal matters, Department of Defense legislation, and general questions of law relating to the Army establishment. The three branches of the war crimes division assist in rendering opinions and advice in connection with the post-trial phase of the World War II war crimes program in which the United States Government participated, as well as in the present program in Korea in which this Government is participating as a member of the United Nations. The patents division has five branches which handle administrative matters, claims, foreign liaison questions, procurement, and prosecution—all having to do with patents in which the Army has substantial interests. The lands division has four branches which are concerned with acquisition, management, and disposal of lands needed for Army use or lands which the Army holds and desires no longer to retain. The procurement division has six branches which have control of matters pertaining to contracts review, contract, frauds, foreign aid, industrial relations, legislative and planning programs, and property disposal other than lands. The claims and litigation division has six branches which devote their attention to administration, foreign claims, legislation, litigation, military claims, and personnel claims.[50]

Influencing the number of military lawyers needed for the administration of military justice alone is the requirement by the Uniform Code of Military Justice that the Judge Advocate General of each of the services of the Armed Forces must appoint in his office officers as appellate government counsel and officers as appellate defense counsel. It is the duty of appellate government counsel to represent the United States before the board of review or the Court of Military Appeals when directed to do so by the Judge Advocate General. It is the duty of appellate defense counsel to represent the accused before the board of review or the Court of Military Appeals:[51]

[50]Special Regulation 10-225-1, Department of the Army, dated 15 September 1949, Organization and Functions, Department of the Army, Office of the Judge Advocate General, Special Staff, pp. 1-12, figure 1, organization chart at p. 11.

[51]U.C.M.J. art. 70(c).

(1) when he is requested to do so by the accused; or

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has transmitted a case to the Court of Military Appeals.

Even though the accused always has the advantage of military counsel without cost to himself, both in the trial courts and before the Court of Military Appeals, he has a right, if he so desires, to be represented before the Court of Military Appeals or the board of review (as well as before trial courts-martial) by civilian counsel if provided by him. Defense counsel are assigned in every case which reaches the Court of Military Appeals. Generally, civilian defense counsel take advantage of the opportunity to have regularly assigned military defense counsel as associate counsel.[52]

Conclusion

Until 1920 there existed in military law no system of appellate court review from the findings of courts-martial. During World War II the Army took some action to grant limited review. The first Army boards of review were created in 1920, while in the Navy there were no boards of review prior to the adoption by the Congress of the Uniform Code of Military Justice in 1950. Following creation of the Army boards of review came the establishment of the judicial council in the Army, which was discontinued with the establishment of the Court of Military Appeals.

The Congress has provided that the judges of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces, as a Code Committee, shall meet annually for the purpose of making a survey of the operation of the Code and furnishing a report to the Armed Services Committee of the Senate and the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments (Army, Navy, Air Force), concerning the number and status of pending cases and for the purpose of submitting such recommendations as the court and the Judge Advocates General deem appropriate.[53]

The report for the period May 31, 1951, to May 31, 1952, lists the more important matters which were advanced as suggested improvements

[52]Manual for Courts-Martial § 48 (1951) provides that even though the accused has provided civilian counsel the duly appointed defense counsel and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel. The same section of the Manual provides that military personnel on active duty or persons employed by the Armed Forces shall not solicit or accept fees of any kind from an accused as reimbursement for acting as counsel before a court-martial or before any of the appellate agencies concerned with the administration of justice under the Code.

[53]U.C.M.J. art. 67(g).

to the present military code, eleven in number, but because of the short period of the court's operation and its volume of work, only one recommendation of importance was made, namely, that legislation be enacted prohibiting special courts-martial from adjudging bad conduct discharges.[54]

The results of the first year of operation of a single court as the final arbiter in all cases where persons have been convicted in trials by courts-martial indicate improvements in the administration of justice by unification of top legal decisions applicable to all members of the Armed Services. Further improvements should come from experience and may be expected to follow recommendations which will be made in the annual reports of the Code Committee.

Trial procedure in general courts-martial should show improvement under the new system as a result of the requirement that in every general court-martial there must be present three professional lawyers. Since the jurisdiction of special courts-martial now extends to awarding up to six months confinement, bad conduct discharges, and levying forfeiture of pay of substantial amounts, it is believed that at least the law member of every special court-martial should be a lawyer. Moreover, the decisions and written opinions of the court should have the effect of substantially improving military justice at the trial level.

In enacting the Uniform Code of Military Justice the Congress intended to modernize the military justice system.[55] Maintaining an efficient military organization and at the same time guaranteeing to American citizens in the Armed Forces due process of law would be an achievement in the best traditions of American jurisprudence and the attainment of the goal set by the Congress in enacting the Uniform Code.

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[54]See note 49 *supra*.
[55]U.S. v. Gordon, 2 C.M.R. 161 (1952).

A COMPARISON OF MISSISSIPPI AND FEDERAL INCOME TAX LAWS

*H. N. Eason**

Our Mississippi Income Tax Law[1] is a rather simple legislative expression. It cites a few definitions, prescribes certain rates of tax, defines gross income and deductions, prescribes exemptions and sets forth a simple administrative procedure for the guidance of the administrator.

When I first went to the State Tax Commission twenty-eight years ago, seven people were engaged in the activity of collecting the state income tax. The Tax Commission now has 242 employees collecting 90 per cent of the general fund revenue, and we collect thirteen taxes. It has never been a particularly successful operation. Until 1934 the state income tax in most instances exceeded the federal tax liability.

Other than administrative provisions any income tax law could be written on one printed page, but in trying to close the loopholes, introduce equity, or for some other purpose, not clearly defined, a book is written, and that is where the tax practitioner comes in. You will find that the tax collector is your second best friend. Your best friend, of course, is your client—unless he fails to pay your bill; but the tax collector, having created the situation which demands your aid, must be given due consideration. Our relations with tax advisors have always been most pleasant because we speak the same language, and because we create the situation which demands their services. Taxpayers cannot understand that the tax collector does not care to increase the tax bill; it is far more pleasant to reduce it.

In our Federal Income Tax Law you will find rates ranging as high as 92 per cent if the income exceeds $200,000. If you will look at the tax table, you will find that any income over $44,000 is taxed at 75 per cent and income over $14,000 is taxed at 53 per cent.[2] Of course, those who pay these tremendous amounts may find it hard to remember that every citizen of this great country must bear his share of responsibility for the situation in which we find ourselves. Not only will it continue, but it may become worse. Twenty years of deficit spending cannot be improved overnight, and that is definitely an understatement.

The Federal Income Tax Law provides an exemption for each member of the family dependent upon the wage earner.[3] At times this presents a most interesting situation because every dependent is worth, tax-wise,

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*Chief of the Division of Income, Mississippi State Tax Commission.

[1]Miss. Laws 1952, c. 402.

[2]INT. REV. CODE § 11(a), 12 (b)(2).

[3]INT. REV. CODE § 25(b)(1)(D).

not less than $133.20[4] every year, under the present rates. There must be a relationship, and the relationship must be by blood in the case of uncle, aunt, nephew and niece.[5] Then we have the added complication of the aged and the blind.[6] Provisions as to the latter are efforts to afford equity. Hair-splitting arguments often result, and we sometimes find a struggle to hide the age and still secure the benefit of the reduced taxes.

In our Mississippi Income Tax Law we have simplified the exemption problem in that we have only two $4,000 for single individuals and $6,000 joint for married persons.[7]

The Mississippi Income Tax Law was largely lifted from the Federal Revenue Act of 1921.[8] The definitions of gross income are very similar. One small difference which may be pointed out is that interest on certain classes of federal obligations may be subjected to tax under the federal law,[9] while Mississippi has not attempted, and probably never will attempt, to tax this particular class of income.[10] To do so would be to invite a federal tax on the interest received from investments in obligations of the state of Mississippi and its political subdivisions.

When we come to deductions there are a number of differences which merit discussion. In corporations where the officers or employees are large stockholders an attempt is often made to avoid taxation on the income of the corporation by distribution of the corporate income in the form of salaries, and then charging them off as a business expense. The Mississippi Income Tax Law provides that only ordinary and necessary business expenses may be deducted,[11] while the federal law has a provision relating to reasonable salaries;[12] it is believed that either phrase will cover the situation when it is met. The Bureau of Internal Revenue very often reduces salaries paid to officials of large corporations

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[4]At the minimum tax rate of 21.2 per cent on incomes of $2000 or less. See note 2 *supra*.

[5]INT. REV. CODE § 25(b) (3).

[6]INT. REV. CODE § 25(b) (1) (B)-(C).

[7]Miss. Laws 1952, c. 402, § 10(1) (a)-(b).

[8]42 STAT. 227 (1921).

[9]55 STAT. 7 (1947), as amended, 56 STAT. 189 (1942), 31 U.S.C. 742a.

[10]Indeed, it is dubious if such procedure would be held constitutional. McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819). *But cf.* Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466 (1939).

[11]Miss. Laws 1952, c. 402, § 8(1).

[12]INT. REV. CODE § 23(a)(1). Under U. S. Treas. Reg. 111, § 29.23(a)-7, it is provided that in cases of excessive salary payments to an employee, if such payments correspond or bear a close relationship to stock holdings, the excessive payments will be treated as a dividend. Thus, such a payment by a corporation would be treated only as a distribution of earnings, rather than as a deductible business expense, on the tax return of the corporation. But payment of greater compensation than is reasonable for the services performed does not affect deductibility of that portion which is reasonable.

and considers the excess sum a dividend, in fact, though not in form. We have made some changes on this basis, but they are few.

On your state return you may not deduct income taxes; in fact, you may not deduct any tax unless it is paid to a tax collecting authority.[13] This means that all the consumer taxes, whether of necessity or result, have never been a problem to us. On the federal return a deduction is allowed for sales and gasoline taxes,[14] and an estimate is often accepted. Until 1944 many other consumer taxes were deductible, but an amendment to the law disposed of that problem.[15]

The fact that federal taxes are not deductible on the state return has always provoked a great deal of discussion at every session of our legislature. At the outset, it may be asserted with confidence that if such a deduction were allowed our state income tax revenue would be reduced not less than 52 per cent (the corporate rate), and perhaps as much as 70 per cent. This would, in effect, abolish our Income Tax Law as a revenue producer, and while I am an advocate of abolition, it is not on this basis.

State income taxes may be deducted on the federal return.[16] State income taxes paid to another state form a basis for a tax credit on the Mississippi return.[17] In other words, the Mississippi tax is reduced by all, or a part, of the income tax paid to such other state. The purpose is to prevent double state income taxation insofar as possible. Mississippi pioneered in the field of trying to avoid double state income taxation. Thirty-four states impose an income tax, and with an effort on the part of the legislatures to raise a certain amount of revenue, together with strained definitions on the part of the administrators, the taxpayer often pays a state income tax to several states on more income than it had. A corporation manufacturing wholly in Alabama and selling wholly in Mississippi, or vice versa, would pay a tax on 200 per cent and 166⅔ per cent of its income, were it not for the income tax credit provided for by these two states in their income tax laws.

There is a great deal of difference between our state and federal statutes, insofar as losses are concerned. The federal statute contains the phrase in the loss provision, "or other casualty,"[18] and this phrase covers a number of losses which may occur. It was eliminated from the Mississippi law in 1938, not because of the revenue involved, but because of the

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[13]Miss. Laws 1952, c. 402, § 8(3).
[14]INT. REV CODE § 23(c)(3).
[15]58 STAT. 34 (1944), amending INT. REV. CODE § 23(c), eliminated federal import duties, excise and stamp taxes as deductible expenses.
[16]INT. REV. CODE § 23(c).
[17]Miss. Laws 1952, c. 402, § 37.
[18]INT. REV. CODE § 23(e)(3).

endless arguments and friction which resulted. Both laws provide that loss from storm may be deducted,[19] but the construction placed on the federal law by its administrators is loss in value, while we strive to restrict such loss to cost. We think that our position is based on reason, in that all income should be reported when realized, and increase in value, while not reportable as income, should not form the basis for a deduction from income.

With respect to depreciation on business and rental properties, our practice is almost identical. But when we consider depletion on natural assets, and by a natural asset we mean one created by the Almighty, and not by man, the depletion charge may be measured by one of two bases—a fixed rate of percentage applied to the gross income or a deduction measured by the exhaustion of the asset. The latter is referred to as the unit method. Regardless of the method used, when the cost of the asset has been charged off in the aggregate, over a number of taxable periods, there is no further deduction.

The trick provision in the federal law is one which resulted from the old legislative activity commonly known as "log-rolling" or "lobbying." In 1918 the federal law provided that certain natural assets, at that time oil and gas deposits, might when discovered, have a measure placed upon them and that value form the basis for measuring annual depletion charges, and be deductible from income. In 1928 certain large oil companies found that their discovery value had been, or was about to be exhausted and, although their income at that time could not be called meager, they, like all of us, wished to reduce the tax bill. The then Secretary of the Treasury owned or controlled one of these large oil companies, and he sent his treasury experts over to Capitol Hill with the recommendation that there be a percentage depletion, measured by 25 per cent of the gross income realized from the severing of the natural assets. In this case, just as in 1918, it was limited to gas and oil. One member of the Senate had the temerity to inquire the manner of reasoning after which they had arrived at that particular rate. The response was made that if he objected to 25 per cent, perhaps a 10 per cent increase would be satisfactory, and the Senate duly voted that the depletion rate would be 27½ per cent.[20] It has been so for twenty-five years; it will probably continue. This is one reason why oil producing corporations are first in earnings today. Remember, all of the intangible drilling and development costs incurred in drilling an oil well may be charged off as expense when sustained. This includes just about all of the cost of the well, other than the derrick and the equipment which you can see; what you see may be depreciated. Such

[19]See note 18 *supra;* Miss. Laws 1952, c. 402, § 8 (5).
[20]Int. Rev. Code §§ 23(m), 114(b)(3).

a subsidy has created that modern phenomenon of the modern American scene called the Texas millionaire.

A quarter of a century has passed, and other natural assets have been brought under the percentage depletion plan. Today, only timber, our chief natural asset in Mississippi, is subjected to depletion, measured by cost, when determining the federal income tax bill.[21]

With respect to depreciation charges, our Mississippi Income Tax Law limits such a deduction to that which is reasonable,[22] and our regulations limit the deduction to the sum charged off on the general ledger and reflected in the balance sheet.

Some ten years ago the phrase "accelerated amortization" gained a place in our Federal Income Tax Law. Oddly enough, it was a New Deal product. It related to defense facilities and the purpose was to persuade capital to invest in the construction and operation of such defense plants, even though the time when they would have orders to fill was uncertain. We have the phrase "accelerated depreciation" in use today. Have your operation, or the additions thereto, designated as promoting the nation's defense and you may accelerate the life by increasing the depreciation charges on such assets.[23] And the figures shown on the federal return as business expenses need not be the same as those in the general ledger and balance sheet exhibits available to stockholders, creditors, or the public.

I am definitely a Tory in my political views, but I see no reason to extend a tax bonus to capital, a wage bonus to labor, in a day when men are called to don a suit of fighting clothes and go forth to battle.

The federal law provides that losses sustained in business may be carried forward or carried back.[24] This creates a field day for the tax advisors. I am a strong advocate of the loss carry forward, although it has not been a part of our state law since 1933, but the loss carry back is one of the several monstrosities in our federal income tax practice.

I defy anyone to read the provisions of the Federal Income Tax Law relating to excessive profits,[25] the tax thereon, and give a reasonable explanation of the mechanics involved in the computation. The best method is to require the taxpayer to prove that its computation is correct. Let me suggest that you familiarize yourself with the excess profits tax. It may die this year, but re-enactment will surely come at a later day.

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[21] INT. REV. CODE §§ 23(m), 113(a).
[22] Miss. Laws 1952, c. 402, § 8(8).
[23] INT. REV. CODE § 124A.
[24] INT. REV. CODE § § 23(s), 122.
[25] INT. REV. CODE § 430 *et seq.*

Another interesting part of our Federal Income Tax Law, which we do not have in the Mississippi law, is the taxing of unrelated business income of otherwise tax-exempt organizations.[26] Non-profit corporations, organizations, and trusts have, because of their exemption from taxation,[27] been able to accumulate assets which include income producing properties. There is no definite information, so far as I know, which will give any idea as to the amount of income which is escaping taxation through this loophole. A number of these trusts or organizations are valid in theory and practice; a great number are tax saving devices, and admittedly so. Unless something is done to prevent the growth of tax-exempt organizations, the time will come when all of the assets of this country will be owned by them. Only the size of the tax bill will measure the time element. For that reason, I think that the step taken by Congress is to be applauded.

The federal law has contained a provision relating to involuntary conversion for many years.[28] Its purpose is simple. It is designed to enable those who are forced against their will to convert assets into cash, to invest the cash realized into a similar asset and not be required to pay a tax on any gain, if such resulted. The loss, of course, would be deductible. The language contained in the federal provision was introduced into our Mississippi law in 1950.[29] It was lifted without change and our practice, of course, will be identical with theirs. In 1951, however, Congress went a step further. If you sell your home voluntarily and the entire proceeds are invested in another home, any gain realized need not be reported.[30] Mississippi has no such provision.

The long-term, short-term capital gains provision[31] has been in the federal law since 1934. It was introduced therein at a time when statistics showed that capital losses were exceeding capital gains, and Congress desired, not to help the taxpayer, but to place more revenue in the treasury. Certain losses are limited to time and the amount of the deduction. Under our Mississippi law all gains are reported, and all losses are deducted. No one is deceived, not even the taxpayer.

The split income feature of the Federal Income Tax Law[32] was introduced therein by the Republican Congress of 1948 and resulted in an increase in tax rates, applied to individuals' income in 1950. The tax

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[26]Int. Rev. Code §§ 421-422. Taxation is only on the income derived from operations which bear no relation to the purpose of the tax-exempt organization.
[27]Int. Rev. Code § 101.
[28]Int. Rev. Code § 112(f).
[29]Miss. Code § 9232(4) (1942).
[30]Int. Rev. Code § 112(n).
[31]Int. Rev. Code § 117.
[32]Int. Rev. Code §§ 12(d), 51(b).

reduction was premature in 1948; a tax reduction in 1953 will also be hasty action.

We now have eight states which, at the time they became a part of this country, had community property statutes in force. Eight states including Mississippi, have abandoned such statutes. During the first thirty-five years that the federal government was collecting income taxes, the individual taxpayers of these eight states if married, could split their income and thereby reduce the tax bill. In order to satisfy the taxpayers of the other forty states, Congress decided to introduce the split income feature.[33] It may be equitable, but it betrays one of the basic principles of income taxation—that the tax should be measured by the ability to pay. If your income is small this provision means nothing to you, but if it is large you have found the pot of gold in our Federal Income Tax Law.

Not yet, despite our efforts, have we been able to solve the problem of taxpayers with large incomes who minimize their tax bill. Trusts will be set up, assets given away, family partnerships formed, or citizenship retained in a community property state. I regret that we did not adopt the split income feature in Mississippi, because we have not yet solved any of these problems relating to tax minimization. I am sure that we never will.

For Mississippi tax purposes, every corporation must file a return.[34] This prohibits the consolidated return provided for in the federal law.[35] The consolidated return, of course, cares for losses sustained by subsidiary or brother corporations. Our law prohibits this possibility of absorbing the losses sustained by one corporation, thereby reducing the income of another.

We now come to that brain child of some able tax practitioner who found another way to reduce or eliminate the tax burden. The applications of it are referred to as "spin-offs," "split-ups," and "split-offs." Let us define them quickly.

A spin-off occurs when a part of the assets of a corporation is transferred to a new corporation and the stock in the latter is distributed to the shareholders of the original corporation without a surrender by the shareholders of stock in the distributing corporation. Example: An existing company, *O*, transfers assets to a new company, *N*, in return for all of the *N* stock. *O* then distributes the *N* stock to the *O* stockholders.

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[33]See note 32 *supra.*

[34]Miss. Laws 1952, c. 402, § 18, requires every corporation subject to taxation under this chapter to file a return. But § 14 exempts banks, certain public service corporations, and non-profit corporations.

[35]Int. Rev. Code § 141.

A split-up occurs when a single existing corporation is replaced by two or more new corporations, the stock in the new corporation being distributed to the shareholders of the existing corporation, which is completely liquidated. Example: *O* transfers certain of its assets to N_1 for N_1 stock. The balance of *O* assets goes to N_2 for N_2 stock. *O* assigns the N_1 and N_2 stock to the *O* shareholders in exchange for its own *(O)* stock; *O* is then liquidated.

A split-off occurs when part of the assets of a corporation is transferred to a new corporation and the stock in the latter is distributed to the shareholders of the original corporation in consideration of a surrender by the shareholders of part of the stock in the distributing corporation. Example: *O* transfers certain of its assets to *N* for *N* stock. *O* assigns the *N* stock to its *(O's)* stockholders for part of their stock.

In these several financial acrobatics no income tax liability is incurred by the corporation, and none by the stockholders. This does give an idea of how involved our Federal Revenue Code has become. The consequences of such transactions under the excess profits tax are too complicated for discussion here. When we meet such combinations in Mississippi, it means nothing, for as yet we do not have an excess profits tax.

It may be well to point out also that the Bureau of Internal Revenue has attempted for many years to tax the profit believed to have resulted from the exchange of one asset for another. In Mississippi we do not tax exchanges, and have not ventured into this rather uncertain field of measuring values. We know, of course, that the end result will be the same. This is true because if a tax is paid on a profit assumed to have been realized when an exchange was made, a new basis is fixed as the cost of the asset which is acquired.

We have long taken the position that, if adequate records are maintained, we are little concerned with depreciation charges, inventories, and bad debts. Just as in the case of the cost or value of an asset, the records will determine the propriety of the figure on the return. Our concern therewith is limited to the correctness and the adequacy of the books of account of the taxpayer.

We have no concern with medical deductions in Mississippi. From 1944 through 1951 we had a specific credit for medical expenses and insurance premiums.[36] Being specific, or a fixed sum, it was really an in-

[36]Miss. Code § 9230(e) (1942), allowed a credit of $100 if single, or $150 if married, toward medical expenses, and a similar additional credit toward insurance premiums; whether such expense was actually sustained was not to be considered. The 1952 law makes no provision for any credit for medical expenses.

crease in exemption. The federal provision is quite different. The gross income must be determined, 5 per cent of that amount computed, and any excess in medical expense is deductible.[37] But that is only the beginning. What is medical expense? If you stroll into a drug store and buy a bottle of vitamins for $9.59, that is not medical expense; but if the doctor prescribes the vitamins, it is a medical expense. The problems involved in construing the applicability of this medical deduction have become legion.[38]

For state purposes, a contribution to a religious, charitable, scientific, or educational organization may be deducted. The deduction may not exceed 10 per cent of the net income as computed without the benefit of that deduction.[39] On the federal return the deduction is limited to 20 per cent, and contributions to political subdivisions may be included.[40] Let us hope that some day we shall all be as generous in giving as the tax returns would have you believe.

In the administration of the revenue statutes an attempt is made to consider equity, but there is little equity in any revenue statute. Revenue laws are written for the purpose of raising a specific amount of revenue. Any doubt as to exemptions and deductions is resolved against the taxpayer; any doubt as to the scope of the statute, insofar as the thing to be taxed in concerned, is resolved against the taxing power. You will find that our gross income section[41] is so worded as to include the world and the fullness thereof.

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[37]INT. REV. CODE § 23(x). Such expense is deductible only if not compensated for by insurance or otherwise. Where a taxpayer received payments under an accident policy, designated in part as indemnity for disability and in part as indemnity for hospitalization, etc., the taxpayer's medical expense was "compensated for by insurance," within the meaning of subsection (x), only to the extent of that specifically designated as indemnity for hospitalization, etc. Deming v. C.I.R., 9 T.C. 383 (1947).

[38]Expenses incurred by the taxpayer in transporting his five year old daughter, who has suffered from respiratory ailments from infancy, to a boarding school in rarefied climate of Arizona, and for her maintenance therein, exclusive of expenses attributable to her education, were held to be deductible as expenses for medical care under subsection (x). Stringham v. C.I.R., 12 T.C. 580 (1949), *aff'd,* 183 F.2d 579 (6th Cir. 1950).

But where children were placed in boarding school on the advice of a physician, due to illness of the mother and to prevent complications, of such illness, such expense was held to be a non-deductible family expense, rather than a medical expense under subsection (x). Ochs v. C.I.R., 17 T.C. 130 (1951), *aff'd,* 195 F.2d. 692 (2nd Cir. 1952).

[39]Miss. Laws 1952, c. 402, § 8(9). Subsection (10) allows the taxpayer to take a straight 10 per cent deduction of gross income, not to exceed $500, in lieu of non-business expenses and contributions. Under the law from 1948 to 1951 this was 8 per cent, with a maximum of $400, in lieu of all expenses and deductions. MISS. CODE § 9228(10) (1942).

[40]INT. REV. CODE § 23(o). Whereas the Mississippi provision limits deductions to a percentage of net income, the federal provision is based on a percentage of adjusted gross income, i.e., gross income after the deduction of only business expenses and a few minor deductions.

[41]Miss. Laws 1952, c. 402, § 7.

Equity in taxation may be found only in a true commune. Under our capitalistic economy we do not have it. Every revenue statute is inequitable to some person or group. We may go a step further and say that every revenue statute is class legislation to some person or group, but so long as our citizens demand, and the word is *demand,* not *request,* all of the various benefits of government which are provided, and which must be provided in even greater measure in the future, we must collect the revenue to support these many and varied activities of the government. As officers of the court, you must soon accept your full responsibility of citizenship, the least of which is paying taxes. May you be a big taxpayer.

State Bar Section

YOUR OPPORTUNITY IN THE LEGAL PROFESSION

*W. N. Ethridge, Jr.**

There is an age-old lament which goes like this: "If youth only knew, if age only could." But happily, the basis of that saying is becoming less and less true. A strong public school system and a more broad and effective college education are the prime reasons. You men have graduated from a good law school, and your diplomas are evidence that you have the essential training to begin the practice of law.

I want to make two specific points with you. First, maintain your intellectual independence and your ideals. You have a strength and idealism which the bar needs. Unfortunately, but almost inevitably, youth's strength and idealism become dissipated in the pursuit and acquisition of worldly goods and putative wisdom. Many lawyers, after years of practice, are too tired and disillusioned to attempt to fulfill the high obligations of the bar to society, after they have learned how to do it. Don't let cynicism of others discourage you.

You have a dual responsibility, to serve your client, and to protect the public interest in the development and functioning of laws and in the operation of government as it affects the people. If individual liberty is to be protected through a government of laws and not of men, if a stable, free society depends upon the maintenance of law and order, then the advice of the lawyer to interpret the basic soundness and meaning of those principles is as necessary in the public interest today as it was nearly two hundred years ago. At that time the voice of the individual lawyer in the meeting-place and on the commons guided public thinking and brought about such an understanding of those fundamentals that it made possible the formulation of the Declaration of Independence and the creation of the Constitution. So maintain your intellectual independence and act upon your ideals.

And, secondly, I urge you to join, support and act through your bar associations when you can. I refer to both the Mississippi and the American Bar Associations. You will be surprised at how many benefits, tangible and intangible, you will derive from them, and at what effective channels they are through which you can serve the profession and the public interest. In the complexities of today's society the voice of the lawyer

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*Associate Justice, Supreme Court of Mississippi. An address made to the graduates of the University of Mississippi Law School, upon their admission to the Bar of the Supreme Court of Mississippi.

in the public interest is more necessary than ever. But we live in an age of organization, and organization is essential to effectiveness. Because of this, the voice and leadership of the individual lawyer, acting alone in the public interest, is hardly noticed in opposition to the clamor of organized groups, whose collective action is directed to the promotion of their own interests, or to those other groups who offer to the public an apparent present advantage as an opiate to dull the public's sensibilities to the age-old encroachment of government upon individual liberties. The public needs the voice of the organized bar, which stands ready to uphold and defend the Constitution, to promote the administration of justice and to otherwise serve the public interest.

The past history of the organized bar has been outstanding in those respects. For example, one prime responsibility which lawyers have is to maintain a continuing interest in improving the administration of justice, particularly in our procedural law, which in many respects is slow, costly and inefficient. But progress in such matters is difficult and long-delayed. The American Bar Association worked for years before the Federal Rules of Civil and Criminal Procedure were promulgated, and before the Federal Administrative Procedure Act was passed. These were tremendous steps in improving court procedures. Your Mississippi State Bar has worked for a long time to improve our procedural law. It has accomplished a little, but most of the job remains. The American Bar Association recently completed a monumental study of judicial administration in every state in the Union. The title of the book is *Minimum Standards of Judicial Administration,* with which every public-spirited member of the Bar should familiarize himself. It is now completing a monumental "Survey of the Legal Profession," a detailed national study of the legal profession in all of its complexities. The American Bar Association has also been instrumental in developing legal aid clinics over the nation for those citizens who are financially unable to employ an attorney. These and other important activities of your American and Mississippi Bars are illustrative of the services and the opportunities which the organized bar offers to all lawyers, both young and old.

And so I say, maintain your intellectual independence and your ideals, and support your American and State Bar Associations. Much remains to be done to improve the procedural aspects of the administration of justice, and the job needs your strength and idealism. If it seems difficult or impossible, you should recall the sound advice General Jan Smuts gave to the students of Oxford: "When enlisted in a good cause, never surrender, for you can never tell what morning re-enforcements in flashing armor will come marching over the hilltop."

My brethren and I welcome you to the Bar of this Court. We expect and know that we will receive from you the counsel and assistance which every lawyer owes to the fair, impartial and efficient administration of justice.

RECENT DECISIONS

CONSTITUTIONAL LAW—TAXATION—INCIDENCE OF PRIVILEGE TAX ON INTERSTATE COMMERCE

Complainant operated, wholly interstate, an underground pipeline. A state statute[1] imposed a privilege tax on the operation of the line. On first hearing the tax was held valid.[2] On suggestion of error sustained, the first opinion was withdrawn and the court held 5-4 that the tax was a privilege tax and hence invalid as violative of the Commerce clause of the Federal Constitution.[3] *Coleman v. Trunkline Gas Co.*, 63 So.2d 73 (Miss. 1952).

In 1925 the U. S. Supreme Court held that a franchise tax levied by Missouri on an oil company doing interstate business exclusively was invalid, since it was on the privilege of doing an interstate business.[4] In 1948 the U. S. Supreme Court held valid a Mississippi franchise tax[5] which had for its basis the protection and benefits afforded by the state government, stating that this tax was only additional recompense for benefits conferred.[6]

In 1930 the U. S. Supreme Court held that a privilege tax[7] on the interstate transmission of gas and oil was invalid.[8] In 1949, in *Interstate Oil Pipe Line Co. v. Stone*,[9] the U. S. Supreme Court stated that a privilege tax[10] was not invalid merely because it was "a 'direct' tax on the 'privilege' of doing interstate business"; that "we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels."

The question of the exact status of a privilege tax on this phase of interstate

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[1]Miss. Laws 1952, c. 410, § 34. It provides: "Upon each person operating a pipe line in or through this state or engaged in transporting in or through this state crude oil, liquid petroleum products, and natural or artificial gas through pipes or conduits, for the privilege of exercising or enjoying such right and power in this state, and *for the privilege of enjoying and receiving the benefit and protection of the government and laws of this state* (italics mine), there is levied a tax, in addition to all other taxes, as follows. . . ." Following is a scale whereunder the person is taxed in proportion to the diameter of the pipe and mileage in the state.

[2]Coleman v. Trunkline Gas Co., 61 So.2d 276 (Miss. 1952).

[3]U.S. CONST. art. I, § 8.

[4]Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925).

[5]MISS. CODE § 9314 (1942). ". . . measured by the amount of capital or its equivalent, for which such organization receives the benefits and protection of the government and laws of the state."

[6]Frankfurter, Vinson, Jackson, Burton dissented and held it a privilege tax; that it was for protection already paid for.

[7]Miss. Laws 1930, c. 88, § 163. "Upon each person engaging or continuing in this state in the business of operating a pipeline or transporting in or through this state oil, or natural or artificial gas, through pipes, or conduits, a tax, as follows." Following is a scale taxing in proportion to mileage and diameter of pipe.

[8]Interstate Natural Gas Co. v. Stone, 284 U.S. 41 (1939).

[9]337 U.S. 662 (1949). The majority consisted of Murphy, Rutledge, Black and Douglas, along with Burton who concurred. In this case Mississippi imposed a "privilege" tax equal to 2% of the gross income of its intrastate business upon a foreign corporation. The court did not have an opportunity to rule on the question of a direct tax since Miss. had construed the levy as only on the intrastate operations of the company. Frankfurter, Vinson, Jackson and Reed dissented and held the tax invalid as a privilege tax with or without apportionment and even if not discriminatory.

[10]U.S. CODE § 10109 (1942).

commerce was answered after a fashion in *Spector Motor Service v. O'Connor.*[11] In that case, the Court, in holding that the power to tax the privilege of engaging in interstate commerce was vested in the federal government, and that such a tax may not be imposed by a state no matter how non-discriminatory it may be nor how fairly it may be apportioned said, "It is not a matter of labels. The incidence of the tax provides the answer."[12] Three justices dissented.[13] In the recent case of *Memphis Steam Laundry-Cleaner v. Stone,*[14] the Court held, Black dissenting, that the operating incidence of the tax may be determined by the states,[15] and thus affirmed and elaborated the above doctrine of the *Spector* case.

In 1952 the Mississippi legislature enacted the privilege tax now in question,[16] the first part of which is almost identical to the 1930 statute.[17] When the validity of the 1952 statute was contested in the instant case, the majority did not deny the tests as set forth by the minority,[18] but advanced the doctrine which had been revived in the *Spector*[19] case—that a state cannot tax commerce which is exclusively interstate simply for the privilege of doing business in that state. The minority, however, were of the opinion that the "formal incidence of the tax should be of less importance than the extent of the burden it places upon interstate commerce."[20] In the instant case the state Supreme Court has held that the tax is for "identically the same privilege and does not confer upon it (the Pipeline Co.) a single right or benefit which it has not already obtained by the payment of its franchise tax, its ad valorem tax, and its income tax." Hence, by the state court's own construction, the operating incidence of the tax, the basis for the state's taxation, has already been exhausted by the above taxes.[21] It is thus submitted that there are two possibilities for affirmance: if the U. S. Supreme Court adopted the minority reasoning of

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[11]340 U.S. 602 (1951). By the time of this case Clark and Minton had replaced Murphy and Rutledge.

[12]The U.S. Supreme Court seems to reject (in the *Spector* case, anyway) Mr. Justice Ethridge's test (63 So.2d 73, 87-88)—"whether the tax imposes an actual economic burden upon commerce which is so substantial as to be disproportionate to the pipe line's legitimate obligations to the state"—as inapplicable to the instant case.

[13]Clark, Black and Douglas dissented. They argued that although this may be a guide for the states, "there is no reasonable warrant for cloaking a purely verbal standard with constitutional dignity." They further argued that "The tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders. . . ."

[14]342 U.S. 389 (1952).

[15]In full it said (pp. 391, 392) "We look to the 'operating incidence' of the tax. . . . The state may be determine for itself the operating incidence of its tax. But it is for this court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce'."

[16]See note 1 *supra.*

[17]See note 7 *supra,* and also unitalicised portion of note 1 *supra.*

[18]See note 12 *supra.*

[19]Spector Motor Service, Inc. v O'Connor, *supra,* note 11, as commented upon by Roesken, *The Impact of the Spector Decision,* 29 TAXES 523 (1951).

[20]Their argument is traced from Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938), where the court said, inter alia, "Even interstate commerce must pay its way." Other later cases are presented, one concluding that a franchise tax upon such companies based on similar benefits received was valid. Memphis Natural Gas v. Stone, 335 U.S. 80 (1948); another which validated a privilege tax on an intrastate incident of an interstate company: Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662 (1949).

[21]*I.e.,* income tax, MISS. CODE §§ 9222 and 9231, and franchise tax, § 9314. It will be noted that the same argument was used against the franchise tax relative to the income tax, but when the U.S. Supreme Court held it (the franchise tax) valid, this Mississippi court does not dispute its constitutionality.

Memphis Natural Gas v. Stone[22] as a basis for their decision, the decision of the state court would be upheld, for four justices in this case have already stated their position as to such a tax and two others have somewhat indicated theirs;[23] and if the U. S. Supreme Court follows its criterion announced in the *Spector* case as confirmed in the *Laundry* case, since the state court has determined that there is no operating incidence or basis for the tax, the ruling of the state court will be upheld. Such a holding would tend to further clarify the issue in this particular field of taxation. A contrary decision, it is believed, would return the question to the pre-*Spector* era.

Wiliam C. Smith, Jr.

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[22]Memphis Natural Gas v. Stone, *supra* note 19.

[23]Frankfurter, Vinson, Jackson, and Burton held in that case that since the franchise tax was for protection and benefits already paid for it was a privilege tax and hence forbidden under the commerce clause. From their concurrence in the *Spector* case and *Laundry* case Minton and Reed would likely go with the above four since the operating incidence of the tax has been found to be nil by the state court.

RECENT BOOKS

THE LEGAL STATUS OF THE TENANT FARMER IN THE SOUTHEAST. By Charles S. Mangum, Jr. The University of North Carolina Press, Chapel Hill, 1952. Pp. 478. $7.50.

This interesting study devotes itself to an analysis of the statutes and appellate decisions dealing generally with farm tenancy law in the Southeast; the book concerns itself with laws relating to the creation, termination and legal incidents of the farm tenancy relationships and their legal, sociological and economic consequences in a region of the United States which is primarily agricultural. The region selected for this study is composed of eleven states* which lend themselves rather neatly to this treatment, because of a marked homogeneity in social attitudes and farming techniques, and the common production of crops of cotton and tobacco which are important to the economy of the Southeast. It may be said at the outset, that the author feels that he deals fairly with the landlord, tenant, cropper and other persons involved in this type relationship. However, he has indicated that the development of the law in this field has been at the expense of the tenant and in favor of the landlord. He indicates that one objective for the legislatures in this region is to provide an opportunity for an industrious individual to attain farm ownership within a reasonable time.

The twenty-two chapters in the book include elaborations of title which may be subsumed under the traditional legal heading of Property, Mortgages, Liens, Landlord and Tenant, Remedies, Tort, Crime and Contract with the last two chapter dealing with Peonage and Suggestions for Reforms to Alleviate the Plight of Farm Tenants. In this connection the author speaks of the "agricultural ladder" and the thin line of distinction between the groups of persons that compose the rungs of this abstract ladder; he denotes the progressive steps which are customarily taken in the effort to obtain a fee simple title and concurrent social recognition as a landowner. The fine shades of distinction which are always present in any class evaluation are not precluded by his categorical list of farm laborer, share cropper, share tenant, cash tenant and finally landowner as representing the successive social order of these persons.

The confused condition of the law with respect to tenancies and cropping contracts is manifest in the delineation of cases on this subject, and it is obvious that "sometimes the courts find it difficult to determine the exact status of the farmer who is cultivating someone else's land." Alabama and North Carolina obviated this problem by abolishing the distinction between the tenant and share cropper. Now any farmer under the usual forms of the cropsharing agreement becomes a tenant automatically. Mr. Mangum ventures that "the technical distinction between tenants and cropper can be altogether abolished without too many qualms."

In the chapter on Agricultural Liens, the author outlines the general rules applicable in each of the eleven jurisdictions in the Southeast, and then proceeds to deal with each state individually. He is of the opinion that courts and legislatures have done an excellent job in protecting the landlord against unscrupulous tenants. The lien constitutes a potent weapon in the hands of the landlord, but care should be taken to insure "that he does not use it as a club to beat the tenant into a state of bondage little better than slavery." It is apparent that the author

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*Alabama, Arkansas, Florida, Georgia, Louisiana, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

has not taken a completely realistic attitude toward a very real problem. Perhaps it would have been appropriate to discuss the rights and privileges which the law offers to the tenant who is receiving the club treatment, and the extent to which the courts have gone to protect him as against the landlord.

To round out a very thorough discussion of the general subject the topic of remedies which are provided for enforcement of landlords' liens is explored. Remedies of distress, attachment, foreclosure of liens, warrants of seizure, claim and delivery, provisional seizure and sequestration and the use of civil actions in enforcing liens are covered in that order. The myriad shades of distinction and overall lack of uniformity with respect to adequate remedies in the light of a twentieth century economy is manifest. In the light of the number and kind of available remedies being used to enforce the landlord's lien a great confusion appears not only to the lawyers but to the courts; consequently the adoption of a uniform procedure should be studied. It would be appropriate for the legislature to devote time to the study of this problem with a view to unifying the several remedies under one heading, the effect of which would be to clarify and simplify and place in a more relatively absolute context the rights and duties of landlord and tenant. The sharecropper is given individual attention in a separate chapter devoted to him entitled Croppers' Rights—Laborers' Liens. Generally, however, croppers are given remedies which are alike with those of the landlord in a tenancy relationship. In most states he has a laborer's lien and relief in equity where he lacks sufficient title to obtain redress in the law court. An apparent contradiction is revealed when the statement is read to the effect that present remedies in most states offer adequate means of preventing "the machinations of unscrupulous landlords." The remedies are presently available, but what is needed is an educational program to teach the cropper how to use them. The contradiction is one reflecting an emotional response of the author which is contrary to his statement of fair dealing with all concerned which Mr. Mangum feels that he has done.

Peonage has been defined, by a federal court, as a condition of compulsory service based upon the indebtedness of the victim, the indebtedness being the cord by which he is tied to the person to whom he owed the obligation. One is left with the impression that a substantial number of tenants and sharecroppers are in a state of peonage in the Southeast today, although the author uses the term "near-peonage" to describe the situation, and adds that even in these years of economic prosperity there are individuals who are so deeply in debt to their landlords that the landlords are able, if they had the desire to do so, to hold such people in a state bordering involuntary servitude. In spite of the very lucid definition offered by the federal courts the term "peonage" is an abstraction and meaning can be gleaned from it only in the light of the facts composing the context in which the word is used, a meaning which is communicable to all persons having knowledge of the facts. I believe this chapter could be spelled out in greater detail and a greater attempt made to convey the author's position more clearly. General interesting suggestions are offered in the last chapter which any legislature, interested in reforms in this field, would do well to explore.

This book is well written, reflecting a tremendous amount of scholarly research and case study. It is well annotated to the laws of the eleven states which make up the region known as the Southeast, and the reviewer recommends it as a treatise on the subject worthy of a place in the library of any attorney. It is annotated to the decisions and statutes of the State of Mississippi and includes a learned discussion of the problems peculiar to the laws of Mississippi in this field. Mr. Mangum's per-

sonal problems is reflected throughout the book. His comments and recommendations reflect a laudable objective, and I am certain that most thinking people would be in sympathy with his goal "that [people] must be given an opportunity to earn a decent living and be made secure in a rural economy which will give both the landlord and the tenant a square deal. Laws must be passed to aid the people in reaching that goal." The point of departure is what is meant by the phrase a "square deal." This reviewer would be interested in reading a book reflecting the problems of the landlord in the Southeast and how he is protected against unscrupulous tenants.

*Arthur B. Custy**

WORKMEN'S COMPENSATION LAW. By Arthur Larson. Matthew Bender & Co., Albany, New York, 1952. Pp. 1573, two volumes. $40.00.

The two volume treatise represents a thorough and commendable effort to present workmen's compensation as a legal subject in readable, orderly form.

The author takes notice of an assumption that compensation is not the kind of legal field that can be reduced to a set of principles and working rules and to the arguments advanced in its support. These arguments are: (1) Variation between the state statutes. (2) The tendency of compensation law to grow up around factual rather than legal classifications. (3) The atmosphere of social controversy pervading the subject ever since its inception.

He counters with two approaches to the statutory variation argument: (1) ". . . The greatest bulk of Compensation does not in fact offer this difficulty in any serious degree. The prevalence of the basic coverage formula—personal injury by accident arising out of and in the course of employment—and the virtually universal fundamental concept of 'employee'. . . permit the development of the greater part of the subject along broad lines having validity in practically every state." (2) Professor Larson has also effected the reduction of variants to groups, with development of the pattern of rules worked out within every group. A compilation state by state is used only when grouping is impractical, since such a compilation would obscure the general controlling rules evolved. However, many of the substantive and procedural provisions of the state statutes are compiled in table form in the Appendix. Thus, variations too small or technical to figure in the textual discussions are available, and a reference to the tables will make clear the statutory background of any case in question. The treatise, however, does not attempt to state general principles drawn from a case without specifying the exact kind of statute interpreted.

With regard to the argument that compensation law tends to develop around factual rather than legal classifications, the author has sought to show how the basic rules cut through the old fact groupings. ". . . For example, a stray bullet case might well form a useful precedent for an unexplained fall case." The objective evidenced in both the text and the index was that of enabling the lawyer to find the rules and cases on the basis of either fact similarity or resemblance in underlying principle.

As to objection number three, *supra,* that the controversial nature of compensation law precludes its presentation as a legal subject, the author has shown a proclivity for an honest, accurate analysis. It is also critical and positive to the point of taking well reasoned sides on specific cases or theories. Professor Larson's com-

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ments on the social aspects, workability, or consistency of a decision or statutory provision are worthy of note by legislators, judges, and sociologists, who will find them a challenge to seek more perfect attainments in this fascinating and interesting field.

The reviewer does not wish to detract from the capable and widely quoted *Horovitz on Workmen's Compensation,* but self-evident comparisions should be mentioned. To the credit of Mr. Horovitz, his liberal attitude towards the purpose of workmen's compensation law has been increasingly reflected by the decisions of our tribunals since his work first was published in 1944. His book does not comment upon or offer access to these later decisions, as do the volumes under review, which were published in 1952. Mr. Horovitz's work, 518 pages in length, does not, of course, contain as much tabulation or detailed discussion as Professor Larson's longer treatise of two volumes.

Volume I, *Conditions of Coverage,* presents in completeness the compensation coverage formula, including such chapter headings as The Nature of Workmen's Compensation. This includes a typical act, a contrasting with tort, and a distinguishing from social insurance. Development of Workmen's Compensation provides an interesting and thorough record of its evolution. Other subjects covered are: Arising Out of the Employment, Course of Employment: Time and Place, Course of Employment: Activity, Misconduct of Employee, Personal Injury by Accident, Employment Status, and Specific Inclusions or Exemptions. The annotations and comments throughout are impressive and adequate.

Volume II, *Benefits, Procedure, Collateral Matters,* covers such areas as disability and personal injury benefits, dependency and death benefits, exclusiveness of the compensation remedy, misconduct of the employer, third party actions, adjective law, conflict of laws, insurance, and relation to other kinds of wage loss protection. The volume also contains an index and a six section Appendix. The Appendix contains tabulations of substantive statutory provisions, benefits, procedural statutory provisions, names and addresses of administrative boards and commissions, standard workmen's compensation and employers' liability policies, and forms.

Each volume is made further attractive by its arrangement as a series of separate pamphlets, which are removable at will from a compression-expansion binder. Units may be re-compiled and supplemented if necessary, instead of whole volumes.

It is the opinion of the reviewer that this two volume treatise will serve as a splendid working tool in briefing compensation questions and as an encouragement to the reading of the entire subject from cover to cover. It will doubtless be welcomed as a significant addition to the subject by members of the bench and bar, as well as legislators, insurance staffs, and all others interested in the law of workmen's compensation. This review might properly be termed an exercise in "gilding the lily" for the writer has found Professor Larson's work highly satisfying in every respect.

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